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The American University in Cairo  
School of Humanities and Social Sciences

**State Capacity and Rule of Law**  
**The Case of Upper Egypt**

A Thesis Submitted to  
The Department of Political Science  
In Partial Fulfillment of the Requirements  
For the Degree of Master of Arts

By

**Reem Fuad Mohamed Youssef Abu Zahra**

Under the supervision of **Dr. Samer Soliman**

**January 2012**

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## INTRODUCTION

This research addresses the question of 'state capacity' or official governability. The ultimate motive behind this research is to discover the factors contributing to state weakness or the lack of its capacity to govern. Governability or social control is a necessary characteristic of any human community to organize inter-human behavior through putting forward constraints on individuals as well as organizations' actions. Governability implies the existence of a certain order according to which people abide and an enforcement mechanism enacting these rules. Compliance is awarded; deviance is punished, and the daily encounters that are neither punished nor rewarded are the "norms." In very simple terms, governability means the ability to 'get things done,' and its antonym is "chaos." In this regard, human communities fall somewhere along a spectrum of effectiveness or ineffectiveness. Scholars have not yet developed any theories explaining "governance," but there are only scattered ideas. Most scholarly contribution focuses on the functional scope of different social actors, including the state, the power dynamics governing them and their impact on society. However, rarely can one find a text explaining the intensity of governance. This research does not tackle the degree of state omnipresence or its functional scope. It deals with governance and law enforcement. Accordingly, the research starts from a premise that the state's "governability" is weak in Egypt.

There are different forms of governability, formal and informal governability. Informal governability means having a system of rule making and rule enforcement that is outside the apparatus of the state. It exists in traditional or tribal societies where society polices itself without a need to have an external enforcement agency. The rules governing people's behavior

are not codified in certain laws or regulations. They rely mostly on a customary law that has been built all over a long period of time.

However, in modern societies, the rules are not self-enforced. Societies delegate the authority to enforce laws to an entity called “the state.” That entity is an abstract concept, but it is materialized into a range of official institutions. There are formal laws governing people’s behavior with regards to access to services, inter-human interaction in the public space and even within the institution itself. The state is expected to fulfill its purpose of organizing the human community and the resources within that society, and it does that by means of institutions or sub-organs governed by rules themselves that they should abide by to be able to function and achieve their goals in society.

If state rules are not producing the intended effect on society, state institutions could resort to other informal means like violence or acquiescence or giving up to informality; and all are signs of governability crisis or weakness. Either the institution in charge of the law enforcement process suffers a problem that hinders it from achieving its goal or the society holds no respect for the state by disregarding its rules. In both cases, the purpose of the state is defeated.

This perspective builds on the dominant conception of the core of “stateness” which emphasizes the use of force. All definitions of state emphasize the idea of enforcement or control to achieve its goals, regardless of what they are. This research tackles the conceptual problem of what “the state” means and adopts the Weberian concepts of “traditional” versus “modern” societies. The literature often differentiates between modern and traditional societies in terms of nature of laws or the content of these laws. For example a modern society would be more

industrialized, more socially liberal, less restrictive of women's freedom and so forth, while a traditional society would generally be the opposite. There is no clear-cut line distinguishing both types of societies. Scholars often use the "good-things-go-together" approach.<sup>1</sup> Weber, however, is concerned more with the 'modus operandi' organizing governance in a society, or the government structure in such societies, as well as the type of authority vested into this entity, the state. It is the existence of a formal modus operandi that distinguishes a modern from a traditional society. However, force is not enough. Violence in society has to have a legitimate social basis, as Weber explicitly says, or it has to conform with an "image" or a "social meaning" as Joel Migdal spells it out. On the other hand, the legitimacy of certain rules alone is not enough. The more complex and "bureaucratized" the state is, the more modern it is. In a traditional society, where kinship plays a significant role in governing human relations, laws and rules are self-enforced, while in modern societies, there is a formal bureaucratized structure responsible for upholding the rules or laws governing inter-human relationship. The mere existence of the state entails delegation of authority to the state to use violence. Therefore, the state is strong as long as it is capable of upholding rule of law and weak in so far as it does not.

The Weberian concept of stateness is compatible with the dominant liberal classical political economy approach of the state. The liberal approach is not 'anti-state.' The liberal approach assumes the existence of a state responsible for certain tasks aimed at providing a platform for the economy to function on its own like. Such public goods are stability, effective regulatory structure, curbing externalities and ensuring competition by allowing free entry to the market. The liberal and neoliberal approaches focus on a state that is "limited" in terms of the number of functions it performs, but assumes it is "strong" and "effective" in achieving the

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<sup>1</sup> As Huntington nicely spelt out in his famous work *Political Order in Changing Societies*

limited functions ascribed to it. This piece of research attempts to examine the strength/weakness of the Egyptian state to enforce rule of law.

### **Weak Governance in Egypt**

The state problem in Egypt is widely felt and recognized by different classes in Egypt. Salwa Ismael, in her account of the people of Boulak El Dakrur, one of the poor districts of Cairo, emphasized people's perspective of the state. They all said, "mafeesh dawla" (there is no state).<sup>2</sup> Recently, there has been a famous incident when a large number of people in Shubra were subject to a big robbery by a man who claimed would invest their money, but ran away with it. When the news spread out that he disappeared, none of the victims reported him. They went to his villas, and buildings to take what they can get, even the iron or wood. In Nov. 2006, on the day of the Islamic festival, Eid, a number of young men attacked women on the street. It was an accident of sexual harassment on a mass scale on a crowded street. Ordinary citizens and shop owners defended the women and beat the assaulters. The police station was steps away from the accident, but the Ministry of Interior denied the event on the premise that "no one reported the event" or filed any charges. When interviewed, eye witnesses said they did not go to the police. These are mere recent examples, but there are plenty of them. The state is weak in people's eyes, and that became a visible problem. Police is publicly perceived as the institution where cases are fabricated and citizens are tortured. Even the media has become outspoken about the loss of state "dignity" in people's eyes. Even some movie makers became daring in portraying police brutality and corruption which made the Ministry of Interior try to campaign through other TV series and songs to counter that impression.

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<sup>2</sup> Ismael, Salwa, *Political Life in Cairo's New Quarters: Encountering the Everyday State* (Cairo: American University in Cairo Press, 2006).

Projection of power may not reflect real power. Some may argue that the state is very powerful and sometimes only the projection of power is enough for people to comply and restore peace. For example, in Beit Allam, a village in Upper Egypt, a famous and bloody vengeance '*tha'r*' incident took the form of mass murder and 22 individuals were ambushed and killed in an ongoing blood feud incident between two families in the village. The state moved a huge number of tanks and amassed a huge number of soldiers and officers and stayed at the scene. Leaders in the ministry of interior negotiated peace and the leaders, even the leader of the family whose members were massacred, had to comply in front of the huge might of the state security apparatus. However, that is a sign of weakness more than a sign of strength. "Strength" means the state apparatus has a stable, predictable and impersonal system of conflict resolution. Had the state had that stable system, it would not need all that power to demonstrate. If the state enjoys public trust, people would have known that that could be the result of their actions and it would not have needed to use (or threaten to use) that incredible amount of force. According to the tribal traditions of Upper Egypt, forgiving the killing of 22 members of a family is a huge violation of tribal law and shame to live with. That means that it was the state threat to use force extensively that forced the leaders to restore order nothing more. However, the hatred causing the blood bath persists, and it is, by nature, cross-generational. The police institution can project violence and threaten to use it; but it does not have the power to apply rule of law, which is in this case bringing a number of murderers from both families to justice. While the police institution has the logistic power to bring a number of murderers to justice, it resorts to settlements through customary tribunals. This is what the thesis would try to examine, the political consideration and priorities of the police system that prevents it from applying rule of law and performing its normal job of "law enforcement."



Different anthropological studies attribute the inability of state or form a legal system to penetrate what is called “traditional” societies such as Upper Egyptian villages to customs. However, this is a circular argument explaining customs by customs. It reveals inability to properly analyze the economic power structures within the Egyptian Upper Egyptian village. It ignores the evolution of customary tribunals and the changes taking place to it, the social changes inside the families or tribes. Also, it ignores the different authoritarian political tools affecting the scene. In fact, a deeper look at the power system within the villages and its relations to the security system add to the explanation why the state, with its judiciary as well as law enforcement arms, is unable to penetrate society. The main argument is that the law enforcement arm of the state assumes a political role has weakened the role of the state by channeling its resources to the ‘wrong’ direction and stripping it of its ‘credibility’ or, to use a political role, ‘legitimacy.’

### **Different Ideas Explain State Weakness and Strength**

Ideas attempting to explain state are scattered. Social phenomena are the product of both state-society interactions. In other words, it is a combination between state institutions and social behavior. Public policy specialists may tend to favor the state-centered way of explaining institutional weakness/strength.

In public sector management, there are standard rules or principles for managing public agencies; however, public policy in reality is “idiosyncratic.”<sup>3</sup> Public policy theories are based on wrong premises. First, they assume that there are standard goals of public policy; and therefore, there are standard rules that should be followed to strengthen state institutions. In

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<sup>3</sup> Fukuyama, Francis, *State- Building: Governance and World Order in the 21<sup>st</sup> Century*, ( New York: Cornell University Press, 2004), 82

reality, while each organization might have specific goals of functions, the goals of different organizations often “evolve” and “emerge as the result of interactions among different organizations.”<sup>4</sup> Second, it is hard to monitor the outputs of agents in different formal organizations. It is hard to measure the quality of the output of some public organization, especially those organizations like public education or health care where hidden action problems are hard to track though not impossible.<sup>5</sup> “Hidden Action Problem” is about the agent-principal relationship. Agents have more hands-on experience with the operation of the work and hence, s/he has more knowledge. The problem is that it is hard to measure the “honesty” or “quality” of the agent’s performance.<sup>6</sup> Therefore, some states rely on a mixture of formal and informal mechanism.<sup>7</sup> In the private sector, it is easy to measure the magnitude of hidden action problems because it is easy to measure the production output. However, in other public sectors like public education or health care, it is hard to view or measure the impact of the hidden knowledge, totally possessed by the agent.<sup>8</sup> Third, “the appropriate degree of delegated discretion will vary according to the endogenous and exogenous conditions that an organization faces over time.” The more complex the economy and society becomes, there has to be a higher level of delegation of authority. The process of delegating authority is risky because it may increase the levels of corruption. So, there has to be an answer as to how much authority to be delegated.<sup>9</sup>

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<sup>4</sup> Fukuyama, 50-3.

<sup>5</sup> Fukuyama 55-61.

<sup>7</sup> Solonik, Steven Lee. The Breakdown of Hierarchies in the Soviet Union and China.1996 .World Politics. Vol. 48, No. 2, Pp 209-239.

<sup>6</sup> Fukuyama, 51-61.

<sup>8</sup> Ibid.

<sup>9</sup> Fukuyama, 67-76)

## **The Focus of this Research: Police Institution**

Manifestations of stateness are evident in every aspect of people's lives, from birth, schooling, working, housing, traveling, marrying, and receiving medical treatment until death. Therefore, studying the state means studying its daily, small and common events as they reveal the rules of the game, formal and informal in state-society interactions.<sup>10</sup> One can study the state in all different walks of life. This research will focus on one institution, the police institution in its daily interaction with society. The reasons behind choosing this institution are plenty. First, security is a function inherent to the state. The functional scope of the state may vary from a country to another. What kinds of services should the state provide differ drastically among different countries. However, only security and defense is the agreed upon function of the state. Therefore, the research will not get into the usual arguments about a big state or a limited state. Most economic theories, even the most skeptical towards state intervention in various walks of life such as neoclassical economics, require the state to perform these roles. Weber, as mentioned earlier, refused the functional definitions of the state on the basis that there are no agreed upon functions inherent in the concept of stateness. However, there are basic functions that, customarily, are and should not be performed by an entity other than the state. These are defense against foreign invasion, domestic security and building an infrastructure. Second, a secure atmosphere is indispensable for development. It is a prerequisite for healthy political and economic life. A democracy cannot work without an efficient police system and no investment would appear in an area that has security concerns. Investors will never risk their money in a

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<sup>10</sup> Painter, Joe. "Prosaic Geographies of Stateness." *Political Geography* (2006), Vol.25, 7. Science Direct.

place with a high rate of crime or a high potential for conflicts to erupt.<sup>11</sup> Therefore, this research will focus on the area least penetrated by the state, Upper Egypt.

### **Why Upper Egypt?**

Most researchers hesitate considering the persistence of blood feud a problem of state capacity. This lack of attention is due to the urban bias of scholarly works. These areas viewed as remote areas that lie and they are least affected by development projects. But in fact, they are neither remote nor limited areas. A big proportion of Egyptians lives there and is affected by weak state governability. Second, scholarly works tend to exclude cultural explanations and refuse them totally on the grounds of being chauvinistic or cultural essentialist, which is true. However, culture is introduced here as only a part that contributes to the making up of both the formal and informal rules within every institution. Such remote and "underdeveloped areas are important, especially that most of African and Arab countries have similar problem of power entities within the state, clan, tribe, etc, defying, if not the mere existence of the state, they are challenging state power. Building on the assumption that 'the state' is important for the discourse on development, this thesis will introduce an eclectic approach of studying state capacity attributing it to cultural as well as structural factors.

### **The Importance of the Topic**

The discipline of studying governability has its roots in Samuel Huntington's harsh critique of modernization theory that assumed all countries of the developing would eventually

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<sup>11</sup> This argument is totally different form the arguments of various Middle Eastern regimes justifying their authoritarian rule.

go through a transition to modernization, understood as "all good things go together."<sup>12</sup> Huntington was concerned with containing the effects of modernization arguing that modernization policies like democratic and economic reform would lead to destabilizing factors eroding states power to fulfill their basic function, govern. His advice is for these states to institutionalize their modes of governance so that they become less vulnerable to de-stabilizing events. The main weakness of this argument is that all traditional societies have their own institutions. They are only different. Therefore, the aim is not to create shared expectations, because they already exist, but rather to create ones that could function and produce the effects of modernization and compatible with new conditions. F. A. Hayek and Douglass North both have been concerned with the issue of trying to emphasize the importance of governance to economics. North emphasized the idea of building predictability. Hayek introduced the importance of "rule of law" to economic prosperity. For the economy to function, there has to be a strong state capable of devoting its "coercive measures" to guarantee building an atmosphere of trust in the enforceability contractual relationships.<sup>13</sup> In fact, recent economic analyses elaborate that Multi-National Corporations (MNCs) put issues of political stability and social order at the forefront of their priorities in their cost-benefit analysis for choosing a country to invest in whether this predictability is derived from the formal rules, countries in the west, or informal rules, China, it should be there.

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<sup>12</sup> Huntington, Samuel, *Political Order in Changing Societies*, The Henry L. Stimson ed. (Virginia: Yale University Press, 1968)

<sup>13</sup> Hayek, F. A. Hayek, *The Constitution of Liberty* (London: Rutledge and Kegan Paul, 1960), 220- 32.

## **Different theoretical schools are incapable in explaining the state weakness in Upper Egypt.**

The behaviorist approach often ascribes phenomenon to characteristics, attitudes and belief systems. They would perceive security problems in Upper Egypt as a pure phenomenon of state facing strong and deeply entrenched social belief system that the state cannot penetrate. Therefore, the state is doomed to be weak until that belief system and public attitudes change. However, such perspective misses out on the complexity of real phenomenon. The state is visible and capable of inflicting change in Upper Egypt. It misses out the details of the negotiated space between the heads of families, government officials and the population. There are situations where the state interferes strongly and imposes rule of law on all parties. In response to the Beit Allam massacre of vengeance between two families, the state responded very aggressively and restored to or enforced rule of law with all its might. Till now, no troubles have emerged in Beit Allam again.

In addition, the behavioral approach tends to be very reductionist downsizing other elements of influence. For example, the public policy literature highlights the “intermediate institutions” of those at the implementation level not the decision making level. There is a gap between both that may alter choices and cause huge change.

The rational choice perspective assume that individuals are self-interested utility maximizes and all behavior could be explained in these terms. In fact rational choice scholars recognize the importance of institutions on imposing constraints on the behavior of actors and therefore cause a change in their course of action. The prisoner dilemma game provides a great example. “When the rules (institutions) are changed, the prisoner’s choices (to defect, to cooperate and so on) also change because the rules structure the choices that will maximize the

prisoner's self interest.”<sup>14</sup> However, historical intuitionism perceives the “strict rationality” of rational choice theory is “overly confining.”<sup>15</sup> There are cultural behavioral elements involved. In short, studying institutions does not mean that one introduces a new variable. Historical institutionalism means that “the structure of political situations leaves its own imprint on political outcomes.”<sup>16</sup> Politics is all about constantly re-drawing or re-negotiating the rule of the game in public space.

### **Literature Review and Methodology**

The literature is diversified since the topic is cross-disciplinary. For the theoretical part, the research drew from different primary and less on secondary sources discussing the concepts of “the state” and “rule of law.”

The literature on the police was harder to find. There are few books in bookstores and libraries on the Police. However, the author managed to apply for a special permission from the Ministry of Interior to have access to the Police Academy Research Center Library affiliated to the Police Academy formally known as “Mubarak Academy for Security.” The library was rich with sources covering different aspect of policing; however, there were limits to the author's ability to browse through the books and dissertations. The choice of books and dissertations was limited to those related to ‘*tha'r*,’ and the author, every time she reads a book, had to write down in a special note card what chapters she read. In addition, photocopying is prohibited for visitors. However, it was very useful in terms of providing data and statistics on Tha'r that are not available to the public. Most importantly, it described how police officers think of the

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<sup>14</sup> Steinmo, Sven, Katherine Thelen, Frank Longstrech. *Structuring Politics: Historical intuitionism in Comparative Analysis* (Cambridge: Cambridge, 1992), 7.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, 9.

phenomenon, deal with it and what they think are the proper strategies to deal with it. That is critical when analyzing the relationship between police and the people in Upper Egypt. In addition, there are few historical documents that are mainly descriptive of the police from a historical perspective. Some other background books focused on the torture exercised by the police.

As for Tha'r in Upper Egypt, there is no enough literature on the subject except for very few books and published articles that are mainly descriptive rather than analytical. Therefore, the author used a historical archive of news stories covering the topic from the year 2002-2007. She also relied on making some interviews to get to know more about the rule of custom in people's lives in Upper Egypt. The fieldwork focused on two villages in *Manfalout* city in *Assyut* governorate, *Al Mandara* and *Nazza Kararr*. Each provides a different example of customary forms of conflict resolution that are prevalent in other parts of Egypt. The interviews covered major customary judges and heads of families, a lawyer who was involved in many of these cases as well as some ordinary people who had experiences with customary tribunals.

Chapter 1 provides a conceptual framework that discusses the different theories of the state and attempts to define the concept of "state capacity" linking it the broader developmental context and arguing that state capacity is closely associated with the ability to enforce rule of law through its executive arm. The chapter outlined the different theoretical debates surrounding the concept of state capacity arguing that rule of law enforcement is the most important element of stateness, and the state's ability to enforce rule of law the major determinant of its "capacity." The state is the "human community that successfully claims the monopoly over the legitimate



use of physical force within a given territory,"<sup>17</sup> and therefore, the ability to “legitimately” and “successfully” use force is the biggest challenge the state could face, and that is the determinant of its capacity.

Chapter two discusses customary tribunals and how they work in different places in Egypt. However, understanding how customs works cannot be understood outside of the broader context of the Egyptian legal reality, both formal and informal. It is crucial to understanding the broader of framework of the relationship between customs and law on the one hand and the entire legal design in Egypt on the other. Custom is one of the pillars of the Egyptian formal legal design like many other states. However, there are cases when customs violate state rules, but they are accepted for political considerations. In this sense, when the customary legal design violates that of the state, questions regarding state power arise. The chapter argues that both the customary and formal legal designs are neither in conflict nor in harmony. The Egyptian legal reality is an outcome of interaction between both customary as well as formal state legal systems.

Chapter three explains and describes what *tha'r* is, the rules governing *tha'r*, the irrelevance of any difference between vendetta and manslaughter in Upper Egyptian culture, the geographical distribution of *tha'r* and magnitude. The main argument of the chapter is refuting the culturist perspective that attributes spread of *tha'r* to poverty and education and highlights the institutional weaknesses of the police force that affect its performance.

Chapter four discusses the performance of the police institution as the main agent of the state in dealing with *tha'r*. The police institution in Egypt perceives the ‘*tha'r*’ as a purely sociological phenomenon that requires social and political remedies rather than a security

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<sup>17</sup> Weber, 78.

problem blaming the spread of *tha'r* to old decedent traditions and lack of religious awareness. Such a perception has pushed the police institution to adopt social and political tools to solve the problem deviating from their real function, law enforcement. Instead of using the various criminal investigation tools, the police force is working in a totally different venue, customary tribunals. In the mean time, police officers suffer a sense of victimization and injustice being blamed for the failures of the political regime and failures to quell opposition since 1952 coup. The Ministry has also imposed harsh working conditions on the officers affecting their performance. They suffer harsh conditions and take the blame for the political failures of the regime.

Chapter five delves into the case of Upper Egypt where the customary legal system violates or challenges the essence of stateness with the help of the Egyptian Regime by examining the conflict resolution system in two villages in the Upper Egyptian Governorate of *Assyut*, *Al Mandara* and *Nazza Karrar* where the researcher did field work. The main argument of this chapter is that the law enforcement arm of the state assumes a political role, it weakens the role of the state by channeling its resources to the 'wrong' direction and stripping it of its 'credibility' or, to use a political role, 'legitimacy.'

The thesis concludes with examining the potential for change in the future. Any change of the customary system of conflict resolution might compromise the power of many local leaders. Therefore, even if there is a will to change and make institutional reforms to the state institutions involved in the process of conflict resolution, will the regime be willing to/capable of bearing the cost of conflict with "losers" from this change?

By nature, the state is one of the very powerful tools capable of inflicting change if the political regime controlling it is willing to. Of course it cannot eliminate such a deeply entrenched phenomenon especially after decades of official recognition and encouragement; however, state intervention in the right direction may provide an alternative to the people. Historically, people resorted to customary forms of conflict resolution mainly because of pragmatic reasons. If the conditions change, an increasing number of people will move towards more just paths of conflict resolution rather than having to comply with political power compromises that could be unjust many times.

## CHAPTER I

### “THE STATE CAPACITY” DEFINED

#### **The Conceptual Problem: The Concept of the “State” Reintroduced**

In their endeavor to explain the mystery of development and underdevelopment and how socio-political and economic phenomena take place, scholars have attempted to pinpoint and understand the sources of power to achieve change. Social sciences have always been concerned with the sources of power causing social phenomena to happen. Where does power lie? How rules of how others should behave are made? Discovering the source of socio-political and economic change is the huge mystery. Each school of thought focuses on certain elements; behaviorists focus on cultural explanations; rational choice theorists focus on rational calculations of self-interested individuals, and Marxists focus more on class conflict. In terms of units of analysis, scholars usually study either government structure to explain behavior or look at the people and their culture and belief systems to explain phenomenon.

Nonetheless, with limited success of these schools, new ones emerged introducing a new unit of analysis, the state, and scholars then developed the new concept that causes a great deal of confusion, “state capacity.” That term is often used to vaguely refer to a state ability to achieve development. Some states are classified along a wide spectrum of strength and weakness. Countries, such as Iraq and Sudan are labeled "failed states." Lebanon and most countries of the developing world are classified as "weak states." This concept has been very controversial in the literature. It is widely believed that labels such as "failed" or "weak" states were used to justify foreign intervention in the domestic affairs of nations of the developing

world. Countries with interventionist intentions argue that state "failure" tends to spill over their countries causing problems like illegal migration and sometimes terrorist attacks the most critical of which was September eleventh bombings. Such labeling is often met with cynicism as hiding "colonial" or at least "interventionist" intentions. Nevertheless, the question of state capacity, heavily studied by scholars adopting a "statist approach" is older than all the current security issues. The "state" as a unit of analysis has been used earlier. "Bringing it back in" intellectual discourse and analysis was in the eighties of the twentieth century before global terrorism has become an issue of concern.

Some scholars (re)introduced "the state" as a unit of analysis or an independent actor in socio-political literature after being absent for ages, except in the Marxist tradition. Until the fifties, the study of the state meant describing the system of governance, the difference between republic, federal, monarchical systems, voting, legislation, interest groups and the kind. The assumption was that the formal rules are the only explanation of reality. However, the fifties and seventies marked the rise of the behaviorist and structural-functionalist schools of thought in the discourse about development that rejected this sterile way of studying government (or governance) and introducing sociology to the political discourse. The result is the total abandonment of the use of state and its institutions as a unit of analysis and the beginning of a "society-centered" approach. In the mid/late seventies, some scholars, neweberians as well as Marxists, started to (re)take "the state" seriously. Charles Tilly talked about the historical development of the nation state. Peter Katzenstein was the first to classify states as "strong" and

"weak."<sup>18</sup> He understood state 'weakness' and 'strength' in terms of the number or the scope of functions it performs relative to each other. He made his comparative analysis among countries of the North. Theda Skocpol and Alfred Stepan built on the Weberian definition of the state arguing that the state is "more than the 'government'." "It is the continuous administrative, legal, bureaucratic and coercive systems that attempt not only to structure relationships between civil society and public authority in a polity but also to structure many crucial relationships within civil society as well."<sup>19</sup> This was the first step towards reviving the talk about the state away from the rigid methods of the forties of the twentieth century.

Scholars who use, the so called "statist approach," are the ones who reject what Theda Skocpol, calls, "society-centered" approaches. The state became a separate unit of analysis that should be studied on its own along with "the society."

On the left side of the spectrum, Millinbad and Nicos Poulantzas built on the Marxist tradition. Marx perceived the state as the structure that serves as an executive arm of the bourgeoisie. Poulantzas modified the Marxists perspective arguing that state structures and its strategies are "moments in a dynamic process of development." In other words, the nature of state institutions is in a continuous process of change where the state becomes selective of the class or the fraction it supports. "Class struggle dominant in a society traverses the very institutional materiality of the state."<sup>20</sup> In this sense, the state enjoys a certain degree of

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<sup>18</sup> In his edited volume entitled "Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States" published in 1978 by University of Wisconsin Press

<sup>19</sup> Quoted in Skocpol, Theda, Peter B. Evans and Dietrich Rueschemeyer, eds., *Bringing the State Back In* (Cambridge: Cambridge, 1985), 7-8.

<sup>20</sup> Kelly, Duncan, "Between Description and Explanation in State Theory: Rethinking Marx and Weber," *Journal of Historical Sociology*, Vol. 13, No. 2, (June 2000)

autonomy from the bourgeoisie class. It may act in their long term interest, but it may also stand against the bourgeoisie if they increase their “exploitation” of the working class to maintain the stability of the capitalist system to save it from itself when the bourgeois greed creates social unrest.

### ***Statist Approach***

The statist or neo-institutionalist approach provides a more sophisticated understanding of the complex social reality. Generally, the statist approach has five basic characteristics. First, it concentrates on issues of rule, governance and control. Second, it assumes that the state has a life of its own, and it could be treated as a variable. The political sphere is "not atomistic." There are institutional constraints on leaders that hinder them from implementing certain policies even if they are willing to. It is not a mere "reflection" of societal interests, rejecting the pluralist paradigm. Third, there is a great deal of emphasis on the institutional constraints, both formal and informal, on both citizens' and officials' behavior. It assumes all parties have certain powers and capable of causing some change. This set of powers is defined by the rules, the formal and informal, and they change over time. Fourth, it is vital to understand the history or the evolution of institutions to explain the rules governing an institution. Historical choices alter the institutional configuration changing future choices. In other words, it recognizes ‘historical contingency’ and ‘path dependency.’ Changing circumstances alter each actor’s definition of his/her own interests. Lastly, it assumes that political conflicts are all about attempts to change the rules of the game. Politics is about who (re)defines the rules of the game.<sup>21</sup> In this sense, the entire discipline of politics is all about

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<sup>21</sup> Krasner, Steven, “Approaches to the State: Alternative Conceptions and Historical Dynamics,” *Comparative Politics*, Vol. 16, No. 2 (Jan., 1984)

changing the ‘rule so the game.’ In short, the statist school assumes the existence of a different structure of power that is capable of affecting the outcomes of regime policies or even altering them altogether, a structure that is different from society but interacts with it. While the

The theoretical debate surrounding the concept of the ‘state’ and the nature of ‘stateness,’ is related to the question of state autonomy. Pluralists and Marxists both perceive the state as an actor dependant on the different social forces within society. The state is an apparatus that merely reflects the power struggles within society.<sup>22</sup> Whoever controls that apparatus controls the course of events. Realists and institutionalists, however, tend to perceive the state as an independent source of power that has a life of its own, and it is capable of “pushing other actors down particular historical paths”<sup>23</sup> including the regime itself or those governing the state. In other words, they seek to analytically separate the state from different social forces.

The purpose of this chapter is to discuss and analyze the different conceptions of the term, ‘state capacity’. First, the author will discuss the concepts of “state” and analyzes the debates around it adopting the Weberian concept of the ‘state.’ Based on that definition and continuing that same of line of thinking, the author will attempt to discuss the concept of ‘state capacity’ arguing that rule of law enforcement is the most important element of stateness, and the state’s ability to enforce rule of law the major determinant of its “capacity.”

### **The State: Historical Roots**

The debate on the state dates back to the Greek and Roman philosophy. Aristotle made a distinction between political power and other kinds of power exercised by humans over others.

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<sup>22</sup> Except for Poulantzas

<sup>23</sup> Hall, Peter A, ed., *The Political Power of Economic Ideas: Keynesianism across Nations* (Princeton: Princeton University Press, 1989), 12.



Political power has a “peculiar quality” other than the size or the degree of power. This quality is linked to an aim it pursues, which is “the attainment of justice” through putting forward a system of relations among men that “ensures certain standards determined by law.” This is what he called ‘Polis’ or the political association that is the “most sovereign and inclusive” form of association. There is a power that stands out for combining might, power and authority. Might is to be used for defense against outsider threats and imposing conformity internally; power is exercised only in accordance with rules that legitimizes it.<sup>24</sup>

Therefore, the idea of an entity possessing power and authority necessary for human association is not new. And it is not a “pure phenomenon of authority”; in other words, it is not all about physical control. It has to enjoy a degree of legitimacy to enjoy this authority. It is endowed with a legitimate right to perform such a function, despite the type of organization. Different societies have put forward different ways of internal governance and means of social control, but such a diversity does not mean there is something in common, governability. The Greek thought that an entity controlling the process of governance and performing the function of social control justifies its existence in providing public goods. Aristotle said that in such a ‘city state,’ and in it only, can humans enjoy “good life.”<sup>25</sup>

Roman philosophers also had their conception of the state emphasizing law as the main constituent element of the state. It is not the “bearer of ultimate values” as Aristotle viewed. Cicero, the Roman lawyer, philosopher and constitutionalist, treated the state in his book, *De Re Publica* (On the Republic) as “a partnership in law” (*consensus iuris*) and not common interest

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<sup>24</sup> Wiener, Philip P., Ed., “Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas” *Psychological Ideas in Antiquity*: Charles Scribner’s Sons, Vol. IV, (1968), Pp. 312- 3.

<sup>25</sup> Ibid.

alone (utilitatis communio) that makes a people into a state (res publica).” However, this law is not aimed at a certain end, regulating public life and inter-human relationships but rather a “natural” law suitable for all nations at all times. The lawyers of Imperial Rome in fact came up with (ius publicum) or the “public law.” They introduced all the rules that organize the distribution of power in society representing the essence of the state; they also elaborated the function and the rules of governance within social institutions.<sup>26</sup>

The term “state,” however, owes its existence to Nicolo Machiavelli. The term came from the word, "status" meaning the prestige or social status of people, namely the ruling figure. However, Machiavelli used the term "state" or "lo stato" to be "synonymous, not only with the prince himself, but with the character of the political regime, the geographical area over which sovereign authority was claimed and maintained, and the very institutions of government required to preserve such authority."<sup>27</sup> The distinction between “the state” and the “prince” or the ruler was very clear in his earliest book, *The Discourses*. In his analysis of the different forms of government, Machiavelli distinguished between the “happy” state and the “unhappy” ones. The happy state is that enjoys a high level of institutional stability; it is a state where there are long lasting rules and laws “without deterioration and without any dangerous disturbance.” An unhappy one is one where there is a challenge to the rules that people in that state have been following. “Men will accept no new law altering the institutions of their state, unless the necessity for such a change be demonstrated.” The state to Machiavelli, is about “the order of things.”<sup>28</sup> that is totally different from the form of government responsible for running state affairs. There are three forms of government, monarch, aristocracy and democracy. They are

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<sup>26</sup> Ibid, 313-4.

<sup>27</sup> Hay, Colin, Michael Lister, *The State: Theories and Issues* (New York: Palgrave Macmillan, 2006), 7.

<sup>28</sup> Machiavelli, Nicolo, *The Discourses on Livy- 1531* (Republished, New York: Barnes and Noble, 2005), 9.

methods to merely methods of running the state. “Those who give its institutions to a State have resource to one or other of these three.”<sup>29</sup> Unlike *The Discourses*, Machiavelli’s other treatise, *The Prince*, is a manual for rulers, Lorenzo De’Medici, to govern and restore order in the chaotic society in Florence after the fall of the republic 1512. In this work, Machiavelli gave up on his democratic ideals of stable institutions to help rulers consolidate personalized rule of a prince and therefore, authoritarianism.<sup>30</sup> He believed that a strong personalized rule could restore order.

Then, it was first with Dante who introduced the terms "lo stato franco" referring to the "political authority regulating the public affairs of an independent community or 'commonwealth'" as distinct from the ruler's power. Jean Bodin and Hobbes also viewed the state as "truly separate from the powers of the ruler and the ruled."<sup>31</sup> Bodin argued that what gives political power its special characteristic is the use of force in the name, or on the bases of law, i.e., of a binding standard of regular procedure.” He labeled the ultimate location where power emanates, the power to legally command and not commanded by others, sovereignty. It is sovereignty that distinguished the state from any other form of human association. Accordingly, it is the supreme arbiter in society. Now scholar has ever denied the existence of a governing authority.

Rousseau, however, recognized that sovereignty is not vested in the government or the body governing the nation. The government is mere “exercise” of sovereignty that might have a distorted view of what the ‘public interest’ is. He ascribed sovereignty to a fantastic abstract being called “the General Will.” That ‘Will’ is not “the sum of all wills,” but rather the “sum of

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<sup>29</sup> Hay, 10.

<sup>30</sup> Machivelli, Nicolo, *The Discourses on Livy- 1520* (New York: Barnes and Noble, 2005), 9

<sup>31</sup> *Ibid.*, 7.

all differences” forming a general moral code. That moral code does not reflect what the public wants or what they think is good for them. The Will or the binding code lies, as Rousseau spelt it, “in people’s hearts,” and that cannot be corrupted but people in general could become deceived. Rousseau’s perceives the sovereignty as something that transcends the passing of time and the changes in the wills of different social forces.<sup>32</sup> That moral code does not reflect what the public wants or what they think is good for them. The Will or the binding code lies, as Rousseau spelt it, “in people’s hearts,” and that cannot be corrupted. The General Will is not the government; the act of governance is the “exercise of this Will,” which implies that the government does not enjoy the sovereignty. It is something else that does; an abstract being that is embodies an unchanging spirit or Idea of a community.

Hegel perceived the state as an abstract idea that manifests itself in a ‘state’ and develops into administrative apparatuses. The state represents the “essential bond of political union” with the ultimate aim of achieving “universal happiness.”<sup>33</sup> The state is the idea of “unity of the general and the particular,” that ends up manifesting itself into a “state. This idea further develops forming its own apparatuses and different forms.<sup>34</sup>

Marx refused Hegel’s concept of state as the ‘ideal collective citizen’ and thought it is “pure mystification” on the part of Hegel.<sup>35</sup> He viewed capitalist state as an instrument of control by the bourgeoisie. It reflects its interests only and its characteristics are only a reflection of the ongoing class struggle between the bourgeoisie and the proletariat. The state exists to

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<sup>32</sup> Rousseau, Jean-Jacques. *The Social Contract and Discourses*. (London: Everyman.1993).

<sup>33</sup> Hegel, G. W. F, *The Philosophy of History* (New York: Dover, 1956), 38-52.

<sup>34</sup> Ibid.

<sup>35</sup> Hay, 2006, 66-7.

preserve the exploitative relations of production in the capitalist system<sup>36</sup>. Other Marxist scholars, Nicos Polantzias argued that the state enjoys a degree of autonomy from the bourgeoisie. It is a situation where the state, although it serves their interests, it also could stand against the bourgeoisie protecting them from themselves in case they increase the level of oppression against the proletariat. In this case, the state could become above the society. The state could be defined in terms of its components, specifying the three major authorities, legislative, judiciary and executive. However, it draws clear-cut boundaries between state and society as if they were separate entities.

Emile Durkheim defines the state in terms of representation. He argues that the state is the "supreme authority endowed with sovereign powers." It is the "organizing center" of the "secondary groups" where representatives of these secondary communities along with state officials "work out" "acts of volition."<sup>37</sup> The state exists to represent a collective consciousness. In this sense, democracy is a precondition for stateness, which is not a viable argument. Democracy and representation are modern phenomenon. Durkheim's argument assumes that the state has emerged only with the emergence of the representation, which is not true. It is not possible to argue that undemocratic states like Egypt, China, who have a long history of supreme authority acting for the other secondary communities, are not states. In addition, he ignored dominance, power and control, the basic agreed-upon conceptions associated to *the state*.

Similarly, both Lock and Hobbs dealt with the state as only a regime that reflects the existing ongoing power struggles within society. Hobbs argued that the state is either "an

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<sup>36</sup> Ibid.

<sup>37</sup> Durkheim, Emile, *Durkheim on Politics and the State*. Giddens, Antony, ed. (New York: Stanford University Press, 1986), 32-40.

assembly of men” or “one man” entrusted to curb the human inclinations to violate others’ rights. A governing group or person would be responsible for keeping them in check. Lock argued that the state is also a group of humans entrusted to protection of the individual property.

This line of thinking assumes that the state only mirrors the existing power struggles in society. In time, a whole new wave of scholarly work has equated the state with the governing regime only. One often reads works where authors attack the state for being oppressive. It is the regime that uses the state apparatus to increase his power. Such reduction of the concept of stateness has resulted into a distorted view of how society works, where power lies and where the potential for change are. It overlooks the real complexity of socio-political phenomenon.

### **Max Weber**

Weber introduced a unique and more concrete method of looking at the ‘state.’ To Weber, the state is not a mirror reflecting power struggles within society and totally dependent on it; it is not a regime or a government imposing rules and forcing events to happen; and it is not only an abstract idea of a ‘collective citizen’ or a ‘General Will.’” He acknowledged the abstractness of the idea of the state, but pinpointed its manifestations in the real world. The state has two unique elements, use of force and legitimacy in a rational bureaucratized mode of governance.

In his long and detailed treatise, *Economy and Society*, Weber mentioned the word, state, only near the end of his work. He analyzed the different types of socio-economic orders. It is the political community, or the state, that is the most advanced forms of social order.

## Weber and Challengers

Weber perceived the state in terms of its *modus operandi*. He refused all functional definitions, and argued that there is no specific function or "task" that "one could say has always been exclusive and peculiar to those associations which are designated as political ones."<sup>38</sup> Therefore, the most viable and least contested definition would focus on the mechanisms not the functions themselves, and at the core of these mechanisms, the use of violence or coercion. The mode of operation is the common element that no political community lacks. Other than that, different states could assume different tasks. To Weber, the state is the "human community that successfully claims the monopoly over the legitimate use of physical force within a given territory."<sup>39</sup>

This community is a "political community" as long as its "social action is aimed at subordinating to orderly domination by the participants a 'territory' and the conduct of the persons within it through readiness to resort to physical force." However, this does not mean a dichotomy between state and society where the state kneels society. The state is a procurer of enforcement within society.

Along with a territory and physical force, Weber requires a level of "social action" on the part of the inhabitants of the territory," the existence of which distinguishes "a political community" from a "traditional one." A "political community," as distinct from a traditional one, exists when it has value systems that justify its possession of power. However, in traditional societies, relations of order and internal regulation owe their legitimacy to the economic relations predominant in the community. He advocates "regulation" of the "interrelations" of those who

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<sup>38</sup> Weber, Max, *Essays in Sociology*, Gerth, H. H., C. Wright Mills ed., (London: Rutledge, 1990), 77.

<sup>39</sup> Ibid. 1991, 78.

live in a specified territory.<sup>40</sup> In short, Weber refused the dichotomy between state and society and focused, on defining the state, on the issue of governability versus anarchy.

Despite attempts to rebel against the Weberian definition, all other definitions have not deviated much from it. In fact, they merely spelled it out and broke it to its components. Among the primary challengers are Anthony Giddens and Joel Migdal, but neither deviate from the essence of the Weberian argument.

Giddens undermined Weber's concept of "legitimacy" and substituted it with a description of the dynamics of social domination. Rule is all about a power struggle where there are no explicit winners or losers; it is about a complex relation of autonomy as well as mutual dependence "sustained by the routine practices that those in subordinate positions employ to influence the activities of others." The state's function is only to protect the "universal qualities upon which it is predicated." It is "a political organization whose rule is territorially ordered and which is able to mobilize the means of violence to sustain that rule," excluding the words "legitimacy" and "success."<sup>41</sup>

Joel Migdal however, provided a better critique of the Weberian definition, but did not deviate from it though. He argues that the association between enforceability and stateness has led research to sterile paths. The ability to enforce rule of law was an 'ideal type' or a standard against which state's weakness/strength is measured. However, Weber's use of the term "successful" to describe state enforcement role rendered Migdal's argument flawed. Migdal

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<sup>40</sup> Weber, Max, *Economy and Society: An Outline of Interpretive Sociology*. (California: University of California Press, 1968) Vol. 2, pp. 901-2.

<sup>41</sup> Giddens, Anthony, *The Constitution of Society: Outline of the Theory of Structuration* (California: University of California Press, 1986) 7-22.



argued that Weber's definition assumes that the state is the only responsible for creating and enforcing the rules, underestimating the "rich negotiation, interaction, and resistance that occur in every human society." This leads researchers to a dead lock, providing no way to theorize about arenas of competing sets of rules," other than making classifications of states as weak, strong, failed or even none-states.<sup>42</sup> However, Weber never underestimated the state -societal interaction and conflict, and that is why one finds these very fluid terms, "legitimate" and "successfully" without dwelling more into how is it that a state could be "successful" and what makes it's the state's use of force 'legitimate' or not. This is where Weber introduces (though he only mentions) the critical multi-faceted and very general terms that comprise all the societal interaction that Migdal talks about. Migdal defines the state as a "field of power" marked by the use and threat of violence and shaped by, first, the image of a coherent, controlling organization in a territory, which is a representation of the people bounded by that territory, and second, the actual practices of its multiple parts."<sup>43</sup> Migdal does not deviate from the Weberian assertion that the state has the monopoly of use of force. However, the "success" of states to enforce rule of law depends on the other concept introduced by Weber, especially "legitimacy."

Migdal provided a good method of analyzing the reasons for state's ability/inability to apply rule of law through examining the "image" or the normative view of the state as well as the "actual practice." The relationship between both elements of the state may in fact give insight to the reasons why a state could be considered strong or weak. Nazih Ayubi also challenges the Weberian definition, but in fact, he adds to it the way Migdal did. Both<sup>44</sup> delved into the sources

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<sup>42</sup> Migdal, Joel, *State in Society: Studying how States and Societies Transform and Constitute one Another* (Cambridge: Cambridge University Press, 2001), 14-6.

<sup>43</sup> Ibid, 15-6.

<sup>44</sup> Ibid.

of consent-generation. While the latter introduced the idea of the "image" that is culturally and historical generated, Ayubi adopted Gramsci's idea of "hegemony" to replace Weber's idea of legitimacy. Gramsci adds to the Marxist conception of the state arguing that the state is the "entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules." In other words, the dominant classes, along with establishing an entity that monopolize the use of coercion in the country, they create the ideological "hegemony" to justify or 'legitimize' their dominance through this entity, the state.

### **State Capacity**

Despite all the different conceptions of 'the state' discussed earlier, state capacity is referred to in the literature to mean the degree to which 'the state,' as an apparatus whose main dynamic of rule regardless of the type of function, is able to 'enforce.' If the state is incapable of performing its function of governability through use of force; this means it has 'failed' in justifying its mere purpose. Scholars tend to locate states along a wide spectrum of strength and weakness. At the far end of this spectrum are state that totally irrelevant to the residents of the territory it should govern and a state that is capable of kneeling the society. However, none of these two extreme ideal types exists. States exist "in" societies, as Migdal argued naming his book. It is an 'autonomous' "entity" in the sense that its institutions have an effect on social outcomes. The pluralist paradigm, naively, perceive the state as merely a reflection of the social interaction. However, as argued earlier, institutions have a life of their own, and they alter the choices for different social actors. All officials who take a position in an institution feel there are powers and constraints on his/her behavior to act. Holding office is "different" as Huntington

rightfully argued.<sup>45</sup> He argues that reality in public office imposes constraints on the behavior of public officials that he/she may not have considered. The process of decision making and implementation is a complex process that has a lot of unintended consequences. Sometimes the official's will and possession of the know-how is not enough to have a certain policy implemented. The state is both autonomous from as well as dependent on society.

State capacity is about governability and the degree to which people abide by rule of law. Violation of laws is a universal phenomenon. However, sometimes, it is inflated or systemized to the extent that people lose trust in the institution or even refuse it altogether. They lose faith in the potential that the state institution will get their affairs done as they want them to be done and legally. This loss of trust means a failure to fulfill its institutional purposes. As a result, the state could turn into a manager of the phenomenon instead of applying rule of law. The better the manager, the more stable the system seems to be and vice versa. The efficiency of the system boils down to the personality of the ruler, manager, employee or police officer, which results into a very dangerous phenomenon, personalization of rule and the state-instability associated with it. It is a situation where efficiency of employees, weather top government officials or the smallest employee in an institution, is not stable and depends on their own sense of morality rather than an impersonal system that provides stability and lack of volatility. Therefore, the determinant of state capacity would be how much formally institutionalized it is on paper and in reality. Accordingly, laws could be considered the embodiment of such an abstract entity, 'the state.' If the state's modus operandi has a power, this force should be governed by certain laws. One cannot study the state's ability to govern, use force, without reference to the laws it is trying to

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<sup>45</sup> Huntington, Samuel, *Political Order in Changing Societies*, The Henry L. Stimson ed. (Virginia: Yale University Press, 1968)

impose, how they are socially perceived, how they were made and how they were ratified, not only how they are applied. By looking at the whole picture of law making and then law application and the societal feedback to these laws, and/or government practices, one can understand state weakness or strength better. The state is not about “law and order.” It is about ‘rule of law’ for ‘order.’

By definition, governance includes two processes, putting forward the rules and implementing them. Weber, in his discussion of social order, outlined the different modes of governance, the sources of law as well as the methods of implementation. Both, the rules and enforcement require an essential element, a degree of consent or legitimacy to be stable. Weber categorized obedience to rules to three degrees of order. When the violation of laws or contravention becomes the rule, the order enjoys mere expediency that is far from being stable. It is a state of failure to enforce the common norms and rules. There is also obedience that comes out of mere habit. However, it is less stable and durable than a legitimate rule because it is voluntary. A legitimate order is the only type worthy of the label ‘social order.’<sup>46</sup>

## **Rule of law and “The State”**

### **The Concept of Rule of Law**

The use of the concept ‘rule of law’ is problematic. It is a highly debatable concept that means different things to different people; however, the disagreement over a precise definition for ‘rule of law’ does not mean abandoning the analytical utility of the term. The philosophical literature on ‘rule of law’ does not provide a consensus on how to define the term. There are two perspectives through which one could perceive rule of law. The first is end-based. It could mean

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<sup>46</sup> Weber, Max.1978. Economy and Society. Guenther Roth et. al Ed. Berkely: University of California Press, 31-2.

the commitment of the state to “provide its citizens with legal remedies against unlawful exertion of state power.”<sup>47</sup> It could also be viewed as

"a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half a century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonable fair, competent, and efficient. Judges are impartial and most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding."<sup>48</sup>

This view emphasizes the moral purpose or concept of law emphasizing issues like civil liberties and constraints on political power. It has to be associated with the protection of citizens' rights from the abusive power of the state. This is how legal philosophers tend to view rule of law, and this is where most criticisms to the terms arises. Some scholars argue that rule of law in this sense is a western-centric concept and not suitable for some societies.

Other scholars such as Michael Oakeshott and Judith Shklar use it to simply mean “good governance” where the state puts forward laws to properly govern behavior in a society to create predictability. They tend to highlight “the institutional attributes believed necessary to actuate the rule of law such as comprehensive laws, well-functioning courts, and trained law enforcement agencies.”<sup>49</sup> Some scholars refer to the later process as “rule by law.” In other words, while the concept of ‘rule of law’ emphasizes civil liberties and constraints on state behavior to protect individuals, the concept of ‘rule by law’ emphasizes the process of order

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<sup>47</sup> Fishburne, Jane Collier, June Starr, *History and Power in the Study of Law: New Directions in Legal Anthropology* (New York: Cornell University Press, 1989), 15.

<sup>48</sup> Carothers, Thomas, “Rule of Law Revival,” *Foreign Affairs*, Vol. 77, No. 2 (2004)96.

<sup>49</sup> Belton, R. K. 2005. Competing Definitions of the Rule of Law: Implications for Practitioners. Carnegie Endowment for International Peace

irrespective of the moral content or the end of the law and its role in protecting individual rights and freedoms. In this sense, 'rule by law' is a universal concept existing in different societies throughout history. In fact, Abu Bakr, Prophet Mohamed's successor, in his first speech after being appointed a "*Khalif*" put forward the basic rules of governance stating that '*Shari'a*' Law is the constitution that should govern people's and as well as the ruler's behavior; any deviance from the law is punishable.

In both cases, there are common elements in both perspectives that emphasize equality before law and law enforcement. Even the goal-oriented approach to 'rule of law' emphasizes some common elements such as clarity of laws, equality before laws and law enforcement. Therefore, the intellectual debate surrounding this concept of rule of law is irrelevant to the topic at hand. All societies throughout history aspire for a certain order to provide them with a degree of predictability and stability, regardless of the nature of this order. The entire political process is all about trying to change the institutions, the rule of the game, the order that forms expectations and defines the criteria for reward and punishment. As mentioned earlier, law is not an end in itself. It is a means to an end, order. A second problem associated with this definition is ignoring the importance of the institutions of enforcement, which is the focus of the second perspective. It describes the institutions necessary for a society to enjoy rule of law. Such a view of rule of law makes researchers embark upon "institutional modeling" or copying of Western institutions of the judiciary and police forces ignoring the purposes of law which are culturally, historically and politically specific.

One can argue that violation of law is a universal phenomenon, even in the most democratic and developed countries of the West. However, sometimes, it is inflated or systemized to the extent that people, as mentioned earlier, lose trust in the state institution, or

never pay heed to it at all. This loss of trust means a failure to fulfill its institutional purposes. When distrust becomes a phenomenon, the state suffers a deep problem. When the phrase “*mafeesh dawla*” or “there is no state” becomes popular among a big proportion of the population that there is a problem, this is exactly what is going on in Egypt. The research does not assume that there could be a perfect system where rule of law is properly upheld. However, there is a wide spectrum of strengths/weakness of state ability to uphold rule of law. Unfortunately, in Egypt, there is a situation where the state gives away its power to the rule of customary forms of conflict resolution.

### **Is it a question of Law making or law application?**

When discussing law enforcement or the capacity of state to enforce law, two issues are brought to the surface, the validity of the law itself and methods of enforcement.

No organizational structure is capable of functioning without public consent or legitimacy. There has to be a wide support and compliance on the part of individual citizens and social actors. Therefore, a law and any enforcement apparatus are both useless if they are incapable of generating compliance. Weber argued that “submission to an order is almost always determined by a variety of interests and by a mixture of adherence to tradition and belief in legality, unless it is a case of entirely new regulation.”<sup>50</sup> The law could be conforming to a custom or convention; that generates compliance. The law could be new and revolutionary, but needs to have a charismatic leader propagating for it; that generates compliance too. There is also compliance in return for economic and/or material interest. Different laws generate different

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<sup>50</sup> Weber, 37-8.

causes of compliance or rejection. How much of that compliance is due to rational reasons, customs or interest affect the degree of legitimacy and therefore law stability.

Weber rightfully argues that custom and personal advantages are “purely effectual” and not “sufficiently reliable” a basis for domination. However, there are three major legitimate sources of authority, rational grounds, traditional grounds and charismatic grounds. The success of a legal order relies, not necessarily on one of them only, but on the “probability” that, to a certain extent, “the appropriate attitudes will exist” and manifest themselves into the people’s daily conduct. <sup>51</sup>

While law making is a political process, law enforcement should not be one in modern states. Police should be a neutral entity whose job is to enforce the law promulgated by the legislative body and the court verdicts. However, law enforcement agencies’ assuming a political role reflects either inability to enforce rule of law or unwillingness to do so. In both cases, respect for the state and therefore state power is compromised.

The police is an “organized civil force” responsible for the maintenance of public peace, safety and order.”<sup>52</sup> It is a function necessary for civilized coexistence among citizens. Law enforcement agents are endowed with the power to use violence in the form of “collecting and communicating intelligence affecting public peace,” preventing offences to the public peace, arresting and detecting offenders and eventually bringing them to justice. Police, all over the globe, have a wide spectrum of functions such as protecting life and property, enforcing the criminal law, investigating criminal offenses, patrolling public places, advising about crime

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<sup>51</sup> Weber, 212-6.

<sup>52</sup> Rai, Haridwar. Dual Control of Law and Order Administration in India: A Study in Magistracy and Police Relationship.



prevention, conducting prosecutions, sentencing for minor offenses, maintaining order and decorum in public places by directing, interrupting, and warning, guarding persons and facilities, regulating traffic, controlling crowds, regulating and suppressing vice ( a function that is adopted in the U.S.), counseling juveniles ( in Netherlands), gathering information about political and social life ( as in France), monitoring elections ( as in Italy), conducting counter-espionage (France), issuing ordinances ( as in Germany), inspecting premises (Germany), issuing permits and licenses ( as in Britain), serving summonses (in Norway), supervising jails (in Norway), impounding animals and lost property ( as in Britain), advising members of the public and referring them to other agencies ( in Scotland), caring for the incapacitated (in the US.), promoting community crime-prevention activities (Scotland) and participating in policy councils of government (as in France).<sup>53</sup>

These are different varieties of functions that police could and do perform in different countries. However, in Western Europe and North America, no police organization does all these functions. Countries differ in the attention given to some functions more than others. The “critical” question is the amount of attention given to each of these functions by the police at different times. However, the police apparatus in Egypt does all of these functions in addition to having specialized police covering different walks of life such as a special police force covering electricity, a police force specializing in tourism let alone the authoritarian function of monitoring opposition and activists. Therefore, the “neutrality” meant in this piece of research means having an equal distance from different political forces. It must not be “instrumentalized” by a certain group at the expense of others. Its main and only function is to uphold rule of law

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<sup>53</sup> Bayley, David H., “Police Function, Structure, and Control in Western Europe and North America: Comparative and Historical Studies,” *Crime and Justice*,: the University of Chicago Press, Vol. 1. (1979) pp. 109-143  
<http://links.jstor.org/sici?sici=0192-3234%281979%291%3C109%3APFSACI%3E2.0.CO%3B2-N>

## **Conclusion**

The main obstacle to studying state capacity is the theoretical debates over the meaning of basic concepts of the “state” and “state capacity.” The different definitions and perspectives of the state have influenced the way scholarly literature has attempted to explain social phenomenon. This piece of research argues that state capacity is closely associated with the ability to enforce rule of law through its executive arm. Rule of the law enforcement is the most important element of stateness across different fields, and it is the main determinant of state capacity.

The concept of the “state” has evolved throughout centuries from being a synonym for the ruling class, a reflection of the power struggles within society, an abstract idea of a “collective citizen” or a “General Will,” to a more sophisticated definition that refused the dichotomy between the state and society, refused reducing the state to a mere ruling class, acknowledge the abstractness of the idea of the state but pinpoints its manifestations in the real world. That is the Weberian definition of the state as the human community which monopolizes the legitimate use of force emphasizing the issue of governability or the intensity of governance versus anarchy.

The following analysis of governability in Egypt is based on the statist intuitionist approach that is based on the assumption that there the state is a different structure of power that is capable of affecting and altering the outcomes of regime policies and societal choices.

## CHAPTER II

### LAW AND CUSTOM

#### **Introduction: The Legal Design**

The relationship between custom and the legal apparatus is complex. It is naive to assume a dichotomous relationship between both. Custom is an integral part of the legal reality in Egypt. It is part of the Egyptian legal system as the second source of law and provides customary methods of adjudication that were adopted by the formal legal apparatus. It also plays a major role in conflict resolution in different regions inside Egypt due to its self-enforcing nature where the society as a whole makes sure rules are properly upheld. On the other hand, the state does not make an effort to reform the formal judicial system for people to resort to instead of customary means. As a result, customary means of conflict resolution are widespread in different regions in Egypt.

#### **Customary Law as a Phase in the Evolution of Law**

Custom has always been the most important source of laws throughout history. In fact, the codification or writing of laws drew heavily and sometimes entirely from custom. Ancient laws drew heavily from custom such as the Code of Hammurabi in ancient Iraq (around the end of the seventeenth century B.C.<sup>54</sup> and the Twelve Tables code. Hammurabi (1727-1686) did not codify all existing customs. He was more of a social reformer and legislator drafting some new laws and redefining some customs based on real-life cases. This is why the code included plenty

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<sup>54</sup> Al Sakka, Mahmoud, *Falsafat wa Tareekh Al Nuthum Al Egtima'eya wa Al Kanuneya: Derasa fi Elm Tatawur Al Kanun* (Cairo: Cairo University Press, 2008), 118.

of hypothetical assumptions; many of the laws started with the prefix “summa” meaning “if.”<sup>55</sup> The Twelve Tables Legal Code was one of the early attempts to create a code of law that drew heavily from custom in the Roman Empire around 455 B.C.. Each table covered the laws covering the procedure for courts and trials, debt, Rights of fathers over the family, inheritance laws, acquisition and possession, land rights, laws of injury, public law and sacred law in addition to two supplementary tables.

In the year 621 B.C., the Draconian legal code emerged based on the old customs existing in Athens after waves of restlessness because the upper classes monopolized the knowledge of the law. However, the written law was only a comprehensive set of existing customary rules as they are written on paper for all citizens. The public was disappointed, as it was a mere formalization of the existing old class system and the harsh rules.<sup>56</sup> Because Dracon law is remarkably harsh, it was unsatisfactory to contemporaries. The first historical attempt to rebel against existing customs and pushed for the redrafting of law was the writing of Solon law in the year 594 B.C.. The law was introduced after calls to refine the law to suit the general trend towards equality among different classes and freedom. It kept the established rules related to commerce, judicial procedures and other customs that were not subject to public rejection; however, it modified laws related slavery such as the enslavement of the insolvent and the bankrupt, inheritance such as limiting inheritance to the eldest son only, and it challenged the

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<sup>55</sup> Al Sakka, 124-25.

<sup>56</sup> El Farrash, Ehab Abdel Fattah. *Dawr Al U'rfi Al Kae'eda Al Kanuneya Fi al Kanun Al Rumani wa Al Sharee'a Al Islameya*, PhD diss., (Cairo:Cairo University,) 2000, 37-38.

fatherly right to own his children, sell them and own their property.<sup>57</sup> Accordingly, it is the first law that selectively codifies custom.<sup>58</sup>

### **Custom in Different Modern Legal Systems: Common Law and Statuary Law Systems**

While one type of legal system, the Statuary Law system, may or may not rely on custom, Common Law System does. The difference between both systems lies in the authority promulgating the law. In the Common Law system prevalent in most Anglo-American systems, jurists rely on a mixture of statutory law put forward by the legislator, regulatory law put forward by the executive branch of government and ‘case law.’ “Case law” is the body of writings explaining verdicts taken by judges in previous cases giving the reason behind these solutions. These interpretations can be cited as precedents other judges could use in future cases. Therefore, it places a great weight to judicial precedents and opinion of other jurists in the past. Such decisions have the power of statutes. At the same time, courts are not absolutely bound by precedent. A great margin of freedom is left for the judge. On the other hand, Statuary or Regulatory Law system does not rely on legal precedents as statutes. The only room for judicial activism<sup>59</sup> is left for judges in interpreting the law not creating legal precedents that other future

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<sup>57</sup> El Farrash, 38-40

<sup>58</sup> Ibid.

<sup>59</sup> Judicial activism means that” judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own considered estimates of the vital needs of contemporary society when the elected "political" branches of the government and/or the various state governments seem to them to be failing to meet these needs. On such a view, judges should not hesitate to go beyond their traditional role as interpreters of the Constitution and laws given to them by others in order to assume a role as independent policy makers or independent "trustees" on behalf of society.” This definition is based on Dr. Paul M. Johnson’s glossary of terms published by University of Auburn University, 1994-2005.

judges could use as binding laws. Common law derives its authority from the customs and traditions that evolved over centuries and judges' interpretations to these customs.<sup>60</sup>

The Common-Law system is prevalent in England, United States and other countries colonized by Britain. However, statutory laws are prevalent in Europe and areas colonized by France and Spain. Egypt is one of those countries invaded by France from 1798-1801. Those three years left long-lasting effect on the Egyptian socio-political sphere; the legal system instituted by Napoleon constituted a hybrid between *Shari'a* law the Napoleonic civil code, and therefore, it is has a statute law system. However, custom plays a major role in the legal system.

### **Custom in Egypt**

Custom plays a dual role in the formal legal system as a source of legislation as well as providing a method of adjudication. The legislator in Egypt believes that custom can be a source of law that can strengthen the legal system by making up of the potential problems with the ordinary laws or statutes. Furthermore, Egyptian law allowed for customary methods of adjudication and conflict resolution namely the customary forms of arbitration and reconciliation.

To study the role custom plays in the Egyptian legal sphere, it is imperative to study it in the context of the broad legal design. The legal system is not only about rules and decisions put forward by a legislative entity. It is "a framework of institutions providing structures that form

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<sup>60</sup> Holmes, Oliver Wendell, G. Edward White. *The Common Law*, (New York: Harvard, 2009)

the conditions of its workable existence and acceptance.<sup>61</sup> Therefore, the legal system as an “institutional design” is not merely a set of laws. It includes the laws prevalent in a certain social setting as well as the means of adjudication. The legal design is two dimensional, substantive and procedural. The substantive dimension of the legal decision has to do with the nature of laws and the law-making process or as one of the major legal philosophers phrased<sup>62</sup>, “Eunomics.”<sup>63</sup> The procedural element is the process of adjudication or the judicial process itself. Therefore a better view of the role of custom could be reached if one analyzes customs as an institution or as a legal design in contrast to a formal legal design.

Building on that concept, one can view both the formal legal system and the informal one as two different legal designs. The legal design could be both formal and customary. The formal legal system includes both the laws governing behavior in a society as well as the judicial process through which law is applied. Likewise, ‘custom’ is two-dimensional, substantive and procedural. There is no agreed-upon definition for customary law. Custom may refer to the laws that are socially-generated or accepted, and that is the substantive dimension of customary law. It may also refer to the customary procedure or the customary process of adjudication or extra-legal forms of arbitration. Arbitration is an informal process aimed at resolving disputes by involving a third neutral party outside the state system. The first refers to the laws themselves. The second refers to the process whereby the laws are applied. The role played by customs in the Egyptian

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<sup>61</sup> Olsen, Henrik Palmer, Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (London: Ashgate Publishing Limited, 2007), 1

<sup>62</sup> Lon Luvois Fuller (1902-1978) is a prominent legal philosopher who studied the relationship between morality and law.

<sup>63</sup> Eunomics is a legal discipline that studies the process of law-making. It studies how laws are made and developed.

legal reality cannot be reduced to such a shallow analysis. The legal/judiciary reality in Egypt is a result of interaction and sometimes conflict between and formal and an informal legal design.

### **Custom as a Source of Legislation**

Custom is the second source of legislation in a hierarchy of power after laws by the parliament, *Shari'a*<sup>64</sup> and finally the principles of justice and natural law. 'Custom' is often defined as "a practice that by its common adoption and long, unvarying habit has come to have the force of law," "the general rules and practices that have become generally adopted through unvarying habit and common use," or "a record of all the established legal and quasi-legal practices within a community."<sup>65</sup> However, custom plays a bigger role in the Egyptian legal reality. All common definitions refer to the nature of the laws leaving aside one important part of custom, the customary process of adjudication in contrast to the formal the state-mediated means. In other words, law has both the procedural element along with the substantive one. When examining the role of custom, one cannot ignore the role played by custom in procedural law in addition to the substantive one.

Making law is not only a matter of procedure (i.e. the legislative process to issue a certain law); it is an outcome of complex philosophical, historical and socio-political factors. The end result of a legal system to Fuller was creating a "good order and workable social arrangements" and for that to be achieved, certain philosophical questions arise among which is

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<sup>64</sup> Shari'a law is Islamic jurisprudence. It refers to the "path" that guides all aspects of Muslim life from routines, familial and religious obligations as well as financial dealings. It is derived primarily from the Quran and the Sunnah which as the sayings, teaching and practices of Prophet Mohamed. The consensus of the Muslim community plays a role in defining the theological manual.

<sup>65</sup> Garner, Bryan A. ed., *Black's Law Dictionary*: West Group Publishing Group, 2<sup>nd</sup> ed., 2001, 169.



the question of “idealism” versus “pragmatism.” In other words, should the institutional design strive to achieve a normative goal like freedom or should the emphasis on the practical application of the law be the primary concern when formulating a legal order? Such a question is important to the study of the role of custom in law. Custom is one important source of laws all over the world. It is the different ways people have voluntarily/spontaneously and gradually developed over extended periods of time, which gives it certain advantages. First, it is so detailed that it covers all aspects that ordinary law does not cover. Second, it is self enforcing since people accepted it as a mode of behavior and rules for long.

The Egyptian formal legal design gives custom a primary status. There are different sources of law in Egypt that follow a hierarchy of power. After the constitution, which is the primary source, judges are required to abide by that hierarchy when adjudicating. The first is legislation by the parliament, customs, Islamic Jurisprudence (Shari’a) and the rules and principles of natural law and justice. If a judge cannot find a solution to the case at hand in legislation, he is required to check if there is a pre-existing custom that does. If not, he can resort to Shari’a Law, and if not, he can finally resort to rules of natural law and justice. This is the order according to Article 1 of the Civil Code.

While legislation is the most important source of law, “*U’rf*” or custom is the set of rules or principles that are socially accepted and people in a certain community get used to abiding by them. However, the mere fact that a certain custom is widely followed does not necessarily give it the power of a law unless it is widely viewed as obligatory. People must not believe that they are freed to depart from it whenever they choose or to over serve it only as a matter of courtesy or moral obligation. It has to be associated with a sense of legal obligation. It is also associated

with a punishment for non-compliant parties. For a custom to enjoy the power of law, it has to have certain characteristics. It has to be general; however, in the case of customary law, the subjects of the law do not have to be the general population; subjects to a custom may be members of a certain group. Such a group may be determined geographically like the customs governing relations in a certain territory like a clan or tribe or a certain guild. Second, it has to be an established rule or principle that people have been following for long time. There is no specific determinate of that “length” or a specific definition for what “long” time is, but it has to be long enough to become entrenched and socially accepted as a given. In court, it is left entirely to the judge to evaluate the criteria that would make a custom qualify to become binding or not. Third, a custom can enjoy the power of a law only if it is widely accepted, and subjects to it have to believe that such a custom is obligatory the violation of which requires punishment, feelings that also evolve gradually and over a long period of time. Also, it is left for the judge in court to decide the time- factor involved. Forth, customs are self-enforced. By definition customs are powerful irrespective of the existence of an entity enforcing them and people have been willingly compliant. Customary law also assumes that subjects to the law are well informed about the content of the custom or the rule itself. However, legally, a custom cannot violate a law. In short, customs are an important source that a judge uses to reach a solution.<sup>66</sup>

For these practical reasons and like other formal legal systems, the Egyptian law draws heavily from custom making it the second sources of law for both the legislator and the judge. Custom both complements and assists the ordinary law. Some customary rules can complement some elements of the law that the ordinary law may not cover adding details. There are plenty of examples in different laws. In commercial law, custom plays a significant role more than any

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<sup>66</sup> Gmee’y, Hassan Abd El Baset, *Al Madkhal Ela El U’lum Al Kanuneya*, (Cairo: Cairo University Press, 2008)

other field. Due to the fast pace of changes in the international commercial field, ordinary law may be restrictive and slow to be issued by the legislator. Therefore, jurists usually resort to the customary ways of doing things instead of going through the official legislative machine to handle such details. In fact, commercial law itself refers in many of its statutes to custom for judges to use, and sometimes it gives it priority over ordinary law. In addition, customs are the main source of law in commerce. For example, a set of customary complementary rules were binding in court along with the existing commercial law until the Law number 17 for the year 1999 (Law 17/1999) was promulgated where such customs were recognized and codified to become part of the ordinary law.<sup>67</sup> In civil law, customary rules play a less significant role. However, civil laws draw from custom in areas related to personal affairs. For example, a custom stipulates that house furniture is the property of the wife. This is a long established social rule.<sup>68</sup> With regard to administrative laws, a judge can resort to custom in areas not covered by ordinary law.

There are different ways where a custom can help or assist the ordinary law address certain points or cases that the law may not have addressed. A custom may help the legislator with the phrasing of the statute such as the laws governing the rent system. Custom may also assist the legislator in explaining the law itself by illuminating the motives behind a certain action. Judges can resort to custom in explaining contracts by illuminating the motives of each party. Custom may also assist the judge in reaching a solution in issues when the law does not cover certain issue and it may explicitly demand the judge to refer to custom.<sup>69</sup>

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<sup>67</sup> El Farrash, 58.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, 63- 65.

Only criminal law does not draw from custom. There is an established rule in the Egyptian criminal system that stipulates “no crime without a law,” which is a custom in itself. In other words, a judge cannot hold a citizen accountable for a crime unless the crime is stipulated in the ordinary law promulgated by the legislative authority. The rationale behind this idea is that crimes are punishable with harsh measures that can take away from the perpetrator’s freedom and maybe his life in case of a death sentence.

While the hierarchical character of the legal design may nullify any decision based on a custom that violates a law, there are exceptions to this rule. The law itself may allow parties to a contract violate the law if they agree to do so, but that is limited to certain laws that are not peremptory (Peremptory norms).

### **Custom as Judicial Procedure**

Not only is custom the second source of legislation, but also at a certain point in history, it was institutionalized to the extent of establishing a court for custom, and the law gave room for arbitration as an extra-legal method of adjudication. In 1980, a court whose sole purpose is to protect customary values was established.

### **Courts Based on Custom**

Not only did the Egyptian state recognize custom as a source of law, it also established a court that handles only issues related to customs. Shortly before his assassination, the former president of Egypt, Anwar Al Sadat, established in the year 1980, what is called “the Court of Basic (Lofty) Principles” or ‘*Mahkamat Al Keyam*’ (Law 105 /1980) and the issuance of “Law of Protection from Bad Conduct” or ‘*Kanun Hedayat Al Keyam Men Al E’eib*’ ( قانون حماية القيم من )

العيب) that is indented to “protect the basic values of society.”<sup>70</sup> The law refers to a vague, ill-defined and wide spectrum of customary rules and religious rules giving them a label “the genuine character of the Egyptian family” that needs to be preserved. That character “embodies the values and traditions,” and protecting such values would “protect national unity and social peace.” However, in 2008, law number 194 was issued to cancel the court of Protection of Bad Conduct and preventing the court of Lofty Principles from accepting more cases as a step to cancel the court altogether.<sup>71</sup>

### **Arbitration**

Not only laws can have custom as their source but also methods of adjudication. Arbitration is a method of dispute resolution “involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”<sup>72</sup> It may be incorporated into the state legal system, as sometimes it is legally recognized provided that it does not violate existing laws. It could be compulsory or required by law or forced by law on the parties; it could be voluntary by agreement of the parties. Or it could be a “final-offer arbitration” in which both parties are required to submit their final offer to the arbitrator who can choose one of them only. However, sometimes, it takes place outside the state apparatus entirely such as many customary tribunals cases in Upper Egypt and Sinai.

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<sup>70</sup> UNDP. Arab Legal Database. <http://www.arab-ipu.org/pdb/RelatedArticlesGvnSPName.asp?SPName=CHRN&StructuredIndexCode=&LawBookID=211220014561810&Year1=&Year2=&YearGorH=>

<sup>71</sup> Law 194/2008, *Bawabat Al Tashree'at Al Masreya*

<sup>72</sup> Garner, Bryan A. ed. Black's Law Dictionary: West Group Publishing Group, 2<sup>nd</sup> edition, 2001, P. 41.

By definition, the judicial system is based on the idea of “arbitrating” between different parties in pursuit of justice, and the history of arbitration can be traced to the history of the development of adjudication. Arbitration is well known since ancient times, and to be more specific, before the beginning of the state system that took over that mission.

Arbitration as a form of adjudication has been spreading all over the world in civil as well as commercial dealings, but it is not perceived as a challenge to state authority. In such instances, arbitration has various advantages. First, it saves the time wasted in the formal legal process in court. Second, it provides different parties with the secrecy needed for the agreements they reach. The fact that it takes place outside of the state system is not considered a challenge to the state system though. The mainstream opinion in this regards, especially in the business world, is that as long as adversaries reach a solution they are both satisfied with and that the solution to the conflict does not violate state laws, arbitration proves to be an efficient dispute settlement mechanism. This is why, normally, different parties agree to sign an official document proving reconciliation. By definition, arbitration is a process outside state apparatus; however, the state may in certain cases recognize it. If the agreement reached does not violate the law, the court system will recognize it and it becomes binding and mandatory. In Egypt, the state recognizes arbitration as a dispute settlement mechanism (Law 27/1994). However, this law is intended to facilitate the legal process related to commercial cases since the adjudication process in Egypt takes a long time ; a single case could take years due to the limited number of judges and the huge amount of cases they work on every day. Arbitration is becoming the method of adjudication most favored internationally in a globalizing world where corporations run transnational businesses in different states with different legal systems. Gradually, international business arbitration is becoming the norm in inter-related markets. Since each country has its

own legal system and formal adjudication process, businesses tend to resort to international arbitration tribunals.

Arbitration, in the modern legal sense, does not necessarily mean adjudication outside of the state system. Domestic legal systems across the globe that recognize arbitration “does not leave the entire process without judicial intervention; state formal judicial system has some authority over arbitration processes to guarantee a just conflict resolution.”<sup>73</sup> Accordingly, arbitration, as recognized by the Egyptian constitution and various laws, does not violate the domestic legal system and is allowed under the condition of conforming to existing ordinary laws promulgated by the legislative authority.

It is also recognized by courts in certain cases, but it is never recognized in criminal cases. This is where arbitration becomes not only outside the state apparatus but also illegal.

Arbitration in criminal cases is recognized as an exception in felonies not the norm. Article 18 of the Egyptian Criminal Procedural Code stipulates that there could be reconciliation in felonies where the punishment is limited to the payment of fines and procedural violations. Reconciliation in manslaughter is also recognized by court if the victim’s family agrees.<sup>74</sup> However, in a case of a deliberate murder, for example, the law does not recognize any reconciliation, as it is the public right to prosecute the murderer. Such cases are prevalent in Upper Egypt and *tha’r* crimes. All interviewees said that when they settle a murder case, if reconciliation is reached, witnesses nullify the case before the court by giving false testimonies

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<sup>73</sup> Al Zeyadi, Ismael Ibrahim. 2007. *Fi Al Tahkim wa Ijtihad Al Kadaa’*: Amoun, Cairo, p. 18.

<sup>74</sup> Shams El Din, Ramadan Khedr Salem. 2008. *Akd Al Sulh fi Al Kanun Al Wad’ey and Islamic Shari’a*. PhD diss., Cairo University, P. 18.

and forge evidence. This is where arbitration becomes completely in violation of the state system.

### **Theories Explaining the Power of Custom**

There are different theories explaining custom's power to be self-enforced. Some argue that the legislator's acknowledgment of custom or '*U'rf*' as a source of law; however, such an argument wrongly assumes that for a certain legal norm or law to be effective, it has to be state-approved, which is not necessarily true. In fact, customary law sometimes proves to be more powerful than ordinary state laws are. Schools of thought however attribute the power of custom to social acceptance and respect. By definition, customs are the norms and rules that different social actors to govern relations among members. If such rules are put forward and have been followed for a long time by a certain community, it makes perfect sense for that same society to adhere to these laws. This is how custom derives its self-enforcing nature even though some of these customs are discriminatory from the modern legal sense.<sup>75</sup> While a citizen can evade law, he/she cannot evade the punishment of customary laws. The whole society is the agent responsible for enforcing customs, and therefore, "an outlaw" who violated a custom cannot survive in an environment that rejects him/her. Even the power structure inside the village is not as efficient as when ordinary members of society collaborate to enforce such rules. For example, if someone is caught stealing, ordinary citizens catch the criminal and keep him until the entity in power, be it the head of a family, an influential citizen in the village or the police in some instances, take him to deal with the crime. Given that the village community is so closed and people know each other, the potential for escaping them is very limited. However, a citizen can

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<sup>75</sup> Some customs may be discriminatory by nature such as Female Genital Mutilation (FGM) and honor killings.



evade state law if the surrounding environment allows him/her to do so. The only agency responsible for executing the legal verdict is the police. If the society rejects cooperation with police, it is easy for an outlaw to escape legal punishment. In other words, customary law is more powerful.

### **Egyptian Judiciary Provides no Proper Alternative**

The formal legal system in Egypt suffers serious problems that drive people to resort to customary forms of conflict resolution. One of the most important ailments of the Egyptian formal legal system is the slow judicial process. Cases may take years and sometimes up to 10 years in court. In an interview with one of the lawyers in the Upper Egyptian governorate, Al Menya, Ashraf Al Orba'a, he said that a judge may have up to 200 cases to examine per day.” Since this is practically impossible, cases get postponed for hundreds and thousands of times. As a result, people resort to customary forms of conflict resolution instead of the slow formal judicial procedures.

In addition to the slow judicial procedures, the impartiality of the judicial system is sometimes questionable. Judges suffer from the same Economic difficulties a large sector of the Egyptian public suffers from. “The living conditions of judges have certainly declined due to the successive flows of inflation and despite the successive raises in their wages.”<sup>76</sup> The Egyptian public opinion has witnessed some “deviations of few judges.”<sup>77</sup> It is also notable that salaries of judges are controlled by the executive branch of government through the Ministry of Justice. In order to acquire and keep public trust in the judiciary, there is a need to raise the financial

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<sup>76</sup> Faraht, Mohamed Nour and Ali Sadek, “Promoting the Rule of Law and Integrity in the Arab Countries” Project Report on the State of the Judiciary in Egypt, Second draft, (The Arab Center for the Development of the Rule of law and Integrity, 2006), 51

<sup>77</sup> Ibid, 51.

standard of judges. The state's lack of interest in increasing the living standard of judges as well as their number to cover the need for judges raise questions related to the will to reform the system.

### **Custom in Egypt: Mapping Customary Law in Egypt: Areas where it is Entrenched Most**

Egypt is one of the countries where customary law and customary tribunals are prevalent and powerful despite Egypt's strong legal heritage. Customary law is dominant in areas where there is a nomadic and Bedouin presence such as Sinai, Upper Egypt and the Eastern and Western Deserts; customary tribunals are also very common in the Delta region. Contrary to conventional wisdom that suggests that the customary legal system is dominant only in remote areas that are away of the centralized political authority in big cities such as Cairo and Alexandria, customary tribunals are widespread in the densely populated cities and villages of the Delta.

A customary tribunal is a gathering of a number of well-known influential prominent figures in the community known as "judges" or "arbitrators" (*Muhakemeen*- محكمين) held to end an animosity between two or more families. The cause of animosity could range from a family problem, conflicts over land, money, parliamentary elections, ordinary fights and commercial issues. Problems are usually aggravated when the conflicts result into injuries or blood spilt.

Customary forms of conflict resolutions differ from a region to the other, and each has its own distinct characteristics and rule in terms of both the structure. While this chapter will describe some of these tribunals, the next one will focus on the different customary means of

conflict resolution in Upper Egypt and state-community interaction in two Upper Egyptian villages.

### **Delta Region**

The Egyptian Delta is one of the regions where use of customary tribunals to settle conflicts are prevalent and state sponsored. In an interview with one famous judge, Sheikh Mohamed Oudah, he described who the customary judge is, how the tribunals work, what the rules governing the legal process are, what the customary rules are and the current problems facing the system. A customary judge is someone well-known and respected in the community. He has to be well acquainted with Islamic jurisprudence or Shari'a Law, Qur'an and Sunna, as well as old customs defining proper behavior. Sheikh Oudah stressed the element of "good sense of judgment" to distinguish "right" and "wrong." He has to be committed to "seeking justice to please God rather than individual benefit." He has to be capable of building an outstanding argument and convincing other judges and the community with it, as hundreds and sometimes thousands of people from within the local community attend the session and listen to the verdict's recitals. Sheikh Oudah believes that the public has the right to know why a certain verdict is best for all parties. People's knowledge of the reasons leading to the verdict would guarantee the different parties' commitment to the enforcement of that verdict in which case, it is the entire community that upholds the responsibility of enforcement leaving no chance for defection. The judge also has to be keen on restoring peace in the community and preventing further damage without acting as a lawyer to any of the parties. In the Delta usually judges do not take money. It is considered part of the "Thawab" or Godly reward. However, it gives the

person well known for being a judge prestige and is a reflection of a high social status. It means that that person is influential and enjoys a high degree of popularity.

When a conflict arises, customary judges are called upon to intervene. Sometimes it is the adversary families who ask certain judges to interfere; sometimes, other community members do, and sometimes it is the security institution that does. The two adversary families could choose the judges evenly but the one judge who constitutes the swing vote among them cannot be chosen by either. He is mostly the person who owns the place where the tribunal is held called “*Raa’ey Al Bait*” or راعى البيت .

To hold the customary tribunal session, there are rules that have to be applied. First, all conflicting parties have to agree to the holding of the session in a gesture that they indeed want a resolution of the conflict and peace restoration. If they refuse, holding the session is pointless, and it means that one of the parties will use force. Second, there have to be guarantees that both parties will abide by the verdict reached whatever it is. There are two types of guarantees, financial and social. Financially, both parties have to sign checks with an equal amount of money to that both have to pay before the session. In case there is a breach, the money goes to the other party. Socially, each party has to have a distinguished figure guaranteeing the enforcement of the verdict from his own family called “*Kabara*” or (كبارة) or could ask for another distinguished and powerful figure from a different family to be his/her *Kabara*. Minutes are taken with such rules, and it is called the minutes of the customary tribunal session or محضر تحكيم عرفى .

The entire customary session (الجلسة العرفية) takes no more than one day. Sheikh Oudah says that it could take more than 10 hours, but it has to be over in one day. Judges call upon witnesses and parties to defend their case. They swear by the Qora’an. Since judges deal with

different cases including injuries and murder, at least one of them has to be an expert in injuries, and he is called “Kassas Al Dam” (قصاص الدم), an expertise that judges inherit from their predecessors. They do not have any medical background, but they are experts with injuries to measure the intensity of each. If the injured is a woman, the judge also examines her condition along with one male member of her family that is considered a “*Mahram*” like brother or a father. The “court” also recognizes certificates from different hospitals and state documents, and they take the responsibility for guaranteeing the authenticity of such documents using their common sense and expertise.

Each injury has its own wergild<sup>78</sup> depending on its severity. A full wergild or ‘*deya*’ in Islamic Shari’a is given in cases of manslaughter, and the *Ulama*’ in Islamic Research Center (مجمع البحوث الإسلامية) affiliated to the *Azhar*<sup>79</sup> decided that a full wergild paid in cases of manslaughter is equal to 4.25 kilos of gold.<sup>80</sup> Therefore, if the injury resulted into the loss of the victim’s hand, half that amount is paid. If both hands, the full wergild is paid. In addition, every stitch is calculated and is worth, according to Sheikh Oudah from 500-1000 Egyptian Pounds.

Sheikh Oudah believes that customary tribunals face an important challenge these days: legalization. He believes that there has to be some state control over those judges, as some of them are not properly qualified to become judges. He believes that there is an increasing number of wealthy people and parliamentary members who become customary judges to gain some prestige and support certain families at the expense of others. He complained that some of them

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<sup>78</sup> A wergild is a sum of money set upon a person’s life paid as compensation from the family of the offender and/or killer to the family of the victim to prevent further blood feud.

<sup>79</sup> *Al Azhar* is the biggest religious intuition in Sunni Islam that is based in Cairo.

<sup>80</sup> It was agreed upon in Islamic *Shari’a* during Prophet Mohamed’s time that a *deya* is worth 100 camels. Contemporary Islamic Researchers in *Azhar* agreed that the 100 camels are now worth 4.25 kilos of gold.

act as lawyers, and other are not fully aware of Shari'a principles which renders them unqualified for such a mission.

The police plays significant role in these sessions. Sheikh Oudah confirmed that almost 80 percent of the cases he adjudicates in, it is the police that asks him to interfere, and representatives of the Ministry of Interior attend most of the sessions. The head of security in the governorate might attend or the head of the criminal investigation department, especially if there is murder case involved. Otherwise, they have to be notified beforehand that there is going to be a customary tribunal. They are responsible for securing the sessions and guaranteeing that all attendees are unarmed. In highly dangerous sessions, the security institution might even bring electronic detectors to inspect all attendees. In case any of the parties defect or refuse the verdict, customary rules might not be sufficient. The police institution uses its lawful right to detain any citizen, according to the emergency law enacted in Egypt from 1981-2011 opening the room for use of violence and police brutality.

### **In the Sinai Peninsula**

Customary law and customary tribunals are very visible in regions with a Bedouin heritage especially Upper Egypt and Sinai. Each has its own characteristics. A tribe is a social group that is based on kinship or descent; a group of people share the same origin, land, religion, language and territory.<sup>81</sup>

The tribal system is a system of social organization where the tribe is a distinct social, political and economic unit enter into relations with different tribes. These tribes enter into

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<sup>81</sup> Ghuneim, Mohamed Ahmed, *Al Dabt Al Ejtema'y wa Al Kanun Al Urfy* ( Cairo: *Ein for Human and Social Studies* , 2009)

various economic and social inter-relations that requires some form of organization. The implications of this system on the legal system are many. First, since the tribe is the main social unit rather than the individual, social peace is associated with peace among the tribes. The legal framework governing their behavior is in essence a law governing inter-tribal relations. Due to constant interaction among different tribes, customs have risen after prolonged periods of negotiations to achieve social control and therefore peaceful co-existence. In addition, law is also a means to maintaining the social solidarity existing inside the tribe, and therefore maintaining the same power structure. Second, the tribal system is very powerful in Sinai. It is even more powerful than the formal legal system. It is harder for an individual to escape social punishment, as the entire society becomes an agent of enforcement unlike the formal law enforcement system where certain limited number of individuals, law enforcement agents, is responsible for fulfilling that function.

The state sometimes, officially, recognizes the authority of some of these tribunals. For example, the Governorate of Northern Sinai has recognized and officially appointed 32 customary judges to settle any dispute that may arise in the region. Resolutions of this court are binding, and parties register the solution in the Notary Office and the office of public prosecutor. If any of the parties object to the solution, he/she can resort to official state legal system.<sup>82</sup>

Each tribe chooses its own leader, but there are not specific criteria based on which the leader is chosen. Each tribe has its own gathering place where all the men belonging to the tribe with its different branches meet called '*Maja'd*,' '*Diwan*' or '*Shag*.' Leadership of the tribe could be inherited or it could go the closest person to the old leader.<sup>83</sup> All members of tribes can

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<sup>82</sup> Ghuneim, 69.

<sup>83</sup> Ibid, 69.

maintain communication only through the Sheikh. For example, if a member to the tribe has to go to the obligatory military service or to have a national ID or a passport issued, he has to have a letter signed by the Sheikh.

Customary law is not codified nor collected; it lies in people's memories. The laws cover a wide range of human activity from land problems, family affairs, commercial issues and all sorts of problems. Some argue the rules are primarily derived from Islamic Shari'a, but the rules are mostly customary. They derive from Shari'a law, but the laws cover issues that Shari'a does not tackle. By nature, customary law is an output of experiences from real cases for long periods of time. For example, punishments for injuries vary depending on the type and intensity of injury. Every stitch has a "price." And the more serious the injury is, the higher the cost. In addition, there are well-known legal procedures that all parties must follow. For example, in case of a fight between two families, the family of the offender must go to the attacked family to make sure the family of the victim does not retaliate until a customary hearing is in place or reconciliation is reached. Governorates in the Peninsula choose 32 customary judges to form what is known as the "Customary Judicial Council" who are entrusted to the knowledge of such memories and wisdom.

The authority of Sheikhs over individuals in the tribe is being reduced with increased educational levels. Members of tribes are engineers, teachers, and doctors. Educated members of the tribes seek independence from the authority of the Sheikh. In the past few decades, the Sheikh's word in different issues is more negotiable, and more recently, members of the tribe demand official registration of the reconciliation gatherings in the office of public persecutor and court. In other words, verbal agreements no longer have the power they used to have.



Parliamentary elections are a manifestation of power structure in the peninsula. In northern Sinai, there are 13 tribes with different sheikhs and 43 different families. The 43 family heads gather to decide who will run in the coming parliamentary elections so that no future grievances arise when a certain family member becomes their representative in the parliament. Interestingly enough, they gather in the National Democratic Party's headquarters in the governorate. Local councils' appointments are also decided upon in these meetings.<sup>84</sup> Parties to the conflict are free to willingly choose among those judges, and they can handle all kinds of problems ranging from murder, manslaughter, commercial affairs, land problems and family affairs.

### **Tribes in Eastern Egypt**

There are many tribes in Egypt's Eastern desert the biggest of which is 'Al Ababda' and 'Al Beshareya,' and both also follow a rigid customary legal system. They derive their laws from both Islamic Shari'a as well as long established set of customs. Custom here takes a name that is different from that in all other regions in Egypt. It is called '*Selef*' or سيف ; and the customary tribunal is called 'Majlis Al Selef.' All problems are solved through customary tribunals: commercial, criminals or family affairs. They also enter into alliances after negotiations to share natural resources existing in the environment. Among such rules is that in case of murder, the victim's family would wait for the other tribe to demand reconciliation for a period that does not exceed a week. They also have a rule that is binding that allows person who feels a certain action of another individual that has negative consequences on him to voice his discontent, and the other party would automatically try to make a restitution. This system is called '*Yay Hamad*' or

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<sup>84</sup> Ghuneim, 70-1.

بيای هماد . In injuries, there are different evaluation methods to measure the damage and decide upon the punishment accordingly. There are different rules governing murder. The killer is either executed in return or he could pay the wergild or 'deya' that reaches 40 camels. If the killer belongs to the same tribe of the victim, he would be required to give, in addition to the normal wergild, one of the women closely linked to him to the victim's family where she would marry one of the family members until she has her first baby and then she is free to chose to either stay or leave to her family. Recently, women began to voice their discontent to that rule, and that is why the murdered would pay double the wergild instead.<sup>85</sup>

### **Conclusion**

Customs are not necessarily associated with a traditional society. It is true that the formal state legal system evolved from being customary laws in Ancient times; however, customs still plays a significant role in the modern legal systems all over the world. Some legal systems are based, to a large extent, on customary norms, and others, such as Egypt, has custom as a major source of law. Custom and law are not in conflict, and in some cases, they are not in absolute harmony. The Egyptian legal system has four sources of law put forward in a hierarchy of power, laws promulgated by the parliament, custom, Islamic Jurisprudence and principles of justice and natural law. The conflict erupts when a long-established customary rule conflicts with the state rules and laws such as the criminal code. Egypt is one of the countries with a strong legal and constitutional heritage. However, when people resort to informality, it might indicate problems with the legal system, either its judicial or executive branch. The judicial system in Egypt does suffer problems that the political regime showed little interest in reforming, which might results

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<sup>85</sup> Al Tahlawy, Mohamed Raga'y. Sukkan Al Saharaa' Al Sharkeya Al Masreya: Dar Al Kutub Wa Al Watha'ek Al Kawmeya, p. 138-9

into the very slow legal process and maybe compromising their independence and integrity. Judges are limited in number; their financial standard is not up to the current rates of inflation, and control for the executive branch of government. As a result, it can be argued that resorting to customary forms of conflict resolution is becoming a phenomenon. Contrary to common stereotypes, customary tribunals are not limited to Upper Egypt, which is already a large segment of population in Egypt, it is spreading in other parts of Egypt such as Sinai and the even the densely populated Delta Region. Such spread is a sign that the general trend is leaning towards customary forms of conflict resolution rather than state-mediated system.

## CHAPTER III

### THA'R IN UPPER EGYPT DESCRIBED

Literature on *tha'r* is limited to some scattered opinion articles in newspapers and some scholarly articles. Almost all of them address the issue as a pure sociological phenomenon and blame tradition for the spread of *tha'r* in Upper Egypt. This chapter provides a descriptive analysis of the *Tha'r* or blood vengeance in Upper Egypt as well as a review of the literature handling the phenomenon. It tackles the origins of the phenomenon and attempts to challenge the common misconceptions related to the over-exaggerated role played by illiteracy and poverty as causes of the '*tha'r*' phenomenon. In other words, it is not only a sociological phenomenon where the culture and inherited misconceptions are the sole or even the main factors exacerbating the problem. The set of data provided by the Ministry of Interior is problematic to rely on and far from being able to help draw any reliable conclusions about '*tha'r*' in Egypt. In addition, the sociological literature on the phenomenon does not provide theories to explain the phenomenon but rather describe it only.

#### Origins

'*Tha'r*' or blood vengeance is an ancient tradition that was most prevalent among Arab tribes in the Arabian Peninsula. It derives its power from family or tribal solidarity where the individual does not enjoy independence from the group-defined rights and duties. Tribes consider the killing of one of its members an assault on the entire group, and the higher the status of the family member killed, the bigger the magnitude of the

assault and the greater the retaliation or vendetta should be. The “value” the victim determines the intensity of the damage done to the family. For example, if the murdered is one of the family’s leaders, one of the family’s educated members such as an engineer, physician, university professor, an army or police officer, retaliation has to target someone as valuable as the person killed or a large number of people to compensate for one “valuable” member. Responsibility for vendetta is a group obligation where the entire family bears the responsibility. Vengeance is both an entitlement to the family of the deceased and a duty, an entitlement to the family to restore its “dignity” and a duty that has to be fulfilled to fend off feeling of “disgrace.”

### **Vendetta and Manslaughter**

As long as considerations of “dignity” are justifications for murder, the difference between deliberate murder and manslaughter becomes irrelevant to the family of the deceased. While *tha’r* inherited rules stipulates that vengeance is allowed only in cases of deliberate murder, in reality, this is not the case. “Many tribes and families do not differentiate between manslaughter and deliberate murder.”<sup>86</sup> Family competition manifests itself in blood vengeance cases, and therefore, manslaughter may result in serious bloody spirals. Many reported vengeance cases that have a long history might be due to a fight between two members of families over a small piece of land or a fight between children that was aggravated to include elder members. Once blood is spilt, permanent animosity or at least competition between families is created. Competition may take a positive form whereby families compete in educating their members and take

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<sup>86</sup> Abdel Gawad, Mohamed Emad. *Al Tha’r Enda Al Arab Mukarana bi Al Kasass fi Al Shari’ea Al Islameya*. Phd. dissertation. Cairo University p. 134

pride in its members who hold socially-respected positions or become wealthy. However, mutual hatred continues. The family of the deceased usually feels victimized and humiliated, feelings that are “the main cause of all problems” as Sheikh Mohamed Oudah, the ‘*Urfi*’ Judge, said. The aim behind vendetta is always “punishment and bringing the sociopolitical balance of power between families back.”

### **Vendetta and Islamic Jurisprudence**

Despite what some Upper Egyptians who believe in the ‘*tha’r*’ mechanism claim that ‘*tha’r*’ rules are driven from Islamic tradition, the rules Islamic *Shari’a* do not conform to the rules of ‘*tha’r*.’ While Islamic jurisprudence approves of the “an-eye-for-an-eye,” principles of bringing about justice called ‘*kasas*,’ vengeance in Upper Egypt does not comply with the conditions necessary for ‘*kasas*.’ Islam recognizes the element of punishment, but in it can only happen to the murderer not any member of the family according to the family’s criteria of the “value” of the deceased. Only the murdered and those who conspired should be punished.<sup>87</sup> In addition, tribal rules stipulate that if the murder happens within the family, the punishment may range from expelling the murderer forever and preventing him from marrying a girl from the family. All his money and property could be confiscated. Furthermore, a father has the right to punish his son or daughter as he wishes even if it results in murder. Consequently, the way in which many Upper Egyptians perceive ‘*kasas*’ is quite different from the way it is perceived in Islamic *Shari’a*.

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<sup>87</sup> There is a principle in Islamic *Shari’a* that is derived from a Qor’anic verse that limits punishment to any crime to the perpetrators and partners, « *la tazru wazeratun wezra u’khra* » or "لا تزر وازرة وزر أخرى"

## **Tha'r has Rules**

*'Tha'r'* has its own rigid rules. One of these rules is that if an authority figure from a different family promises to protect the murderer, the family of the deceased would be required to enter a conflict with that figure as well. Second, females in the family of the deceased are not allowed to dress colorful clothes until vengeance is taken. They are allowed to cook dark-looking food only, and marriages take place without a big ceremony. In addition, a female can refuse to sleep with her husband who refuses to take the vengeance. Women and children must not be killed, and if it happens that they are killed, it is considered a sign of cowardice punishable by more killings on the other side. Vengeance must of taken from men; however, if women and children fall victims, in reality, the blood spiral may not discriminate between sexes and ages. Damage of property and cattle is also considered a sign of cowardice and meanness. It shows the murderer is not capable of facing the challenge and getting their vengeance "like men." *'Tha'r'* cannot be taken in certain occasions such as harvest time, during excessive rainfall and locust attacks to lessen the impact of the fight on people's livelihood since the whole village becomes a dangerous territory for people. Women and children need to walk around safely and to fend off the common damage of excessive rainfalls and locust. Houses are forbidden territory. No vengeance or blood is to be spilt there. Finally, it is well known that vengeance cannot be taken in the presence of children so as not to put them in danger, and they should not see a murder at such an early age.

Compliance to such inherited rules is being shaken as time passes due to reduced tribal bondages. Recently, there is a great deal of disobedience of such rules. For

example, “*Beit Allam Massacre*”<sup>88</sup> where around 22 were killed, was mass murder where women and children were killed as well as unarmed men. Although there is no official estimate of the actual rate of defiance to family and tribal rules, there is noticeable change in the degree of compliance to old rules. *Beit Allam’s* massacre is a very blunt example, but there are cases of disobedience to tribal rules.

### **The Geographical Distribution of Tha’r**

*Tha’r’* is a phenomenon that is widespread all over Egypt; however, it is more prevalent and institutionalized in Upper Egypt and areas with strong tribal institutions. (See table 1-A) It is concentrated especially in the governorates of Assyut and Sohag where 58.7 percent of ‘*tha’r*’ cases are officially reported in 2001. The tables below show the concentration in Upper Egyptian governorates as well as areas where there is a strong tribal concentration in Sinai Peninsula. Table 1-B shows that *tha’r* is a consistent phenomenon over the years (1997-2001)

### **Percentage of *tha’r* compared to other crimes in the year 2001**

<b>Governorate</b>	<b>Percentage of <i>tha’r</i> to other crimes</b>
Giza	3.5 %
Alexandria	4.5 %

<sup>88</sup> In a conflict between two families, Abd El Reheem and Hanashat, in the governorate of Sohag, a massacre took place where one family attacked a microbus and cars of one family, and 22 persons were killed with machine guns. It was mass murder. The brutality of this incident was shocking to the Egyptian society and even the Upper Egyptian society since women and a teenager were among the murdered.



Beheira	6.3 %
Northern Sinai	16.7
Southern Sinai	100 % (only one case
Beni Swief (Upper Egypt)	13.2%
Fayum (Upper Egypt)	23.1%
Menya (Upper Egypt)	11.4%
Assyut (Upper Egypt)	23 %
Qena (Upper Egypt)	4.8 %
The Red Sea Governorate	20 %
Total	12 % of total crimes in Egypt

Source: Statistics Department, Criminal Investigation Unit, General Security Division <sup>89</sup>

<sup>89</sup> Cited in Kandil, Alaa' El Din, Ghaleb Abdel Gawad, Amr Hany and Amr Zaki, "Hagm wa Mustakbal Thaherat Al Tha'r fi Misr: Derasa Ihsa'eya Tahlileya," (Police Training Institute: Police Academy, 2002), 180.

**Percentage of Tha'r Cases to Total Murder Cases by Governorate**

<b>Governorate</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
Assyut	20.6% (45 Cases)	20.9% (43 Cases)	17% (41 Cases)	20.7% (47 Cases)	23% (44 Cases)
Sohag	24.2% (15 Cases)	19.1% (8 Cases)	23.1% (6 Cases)	18.5% 10 (Cases)	35.7% 10 ( Cases)
Minya	21.6% 8 (Cases)	20.6% 7 (Cases)	24.1% 7 (Cases)	22.2% 4 (Cases)	11.4% 4 (Cases)
Beni Sweif	3% 1(Case)	25% 5 (Cases)	10.3% 3 (Cases)	6.9 % 2 (Cases)	13.2% 2 (Cases)

Source: Statistics Department, Criminal Investigation Unit, General Security Division <sup>90</sup>

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<sup>90</sup> Ibid, 180.

## Magnitude of Tha'r

Tha'r constitutes around 11-12 percent of murder crimes in Egypt. The available data (from the period 1997-2001) show a clear consistency over the years. Tha'r incidents are not sporadic events. They are consistent over the years and became part of people's lives. In an interview in Nazza Karar in the governorate of Assyut, interviewees said that the voice of gun shooting is normal every once in a while. In fact, a couple of days before the interview, interviewees said that there were gun shooting between two families but have not resulted into serious injuries.

Year	Percentage of Tha'r to Crimes	Number of Cases	Total Number of Murder Cases
1997	11%	85	717
1998	12.7%	91	714
1999	10.5%	69	659
2000	12.4%	80	646
2001	12.4%	72	601

Source: Kandil, Alaa' El Din, Ghaleb Abdel Gawad, Amr Hany and Amr Zaki, "Hagm wa Mustakbal Thaherat Al Tha'r fi Misr: Derasa Ihsa'eya Tahlileya," (Police Training Institute: Police Academy, 2002), 180.

## Causes of Tha'r

Sociological research, media propaganda and research issued by police academy research centers all attribute spread of 'tha'r' to tradition, low educational levels and poverty.

While police statistics provide some evidence to support such an argument, relying on this set of data is misleading. In the coming section includes a thorough analysis of each factor using the data of the Ministry of Interior as well as a critique of the conclusions drawn based on this set of data.

### **Vengeance and Education**

Despite problems with the data available on vengeance and education, it reveals that actual perpetrators of the crime are mostly among the less-educated but still a number of educated individuals may commit a vengeance crime.(See table below)

#### **The Educational Attainment of *tha'r* Perpetrators**

<b>Year</b>	<b>Number of Accused</b>	<b>Illiterates</b>	<b>Literates</b>	<b>Basic Education</b>	<b>Preparatory Education</b>	<b>Secondary Education</b>	<b>University Education</b>	<b>Unknown</b>
<b>1997</b>	231	78%	9%	-	2%	8%	3%	-
<b>1998</b>	231	77%	11%	-	1%	6%	5%	-
<b>1999</b>	189	72%	16%	-	3%	5%	2%	2%
<b>2000</b>	221	72%	11%	.05%	-	8%	9%	-
<b>2001</b>	178	74%	17%	-	1%	6%	2%	-

Source: General Security Department- Criminal Monitoring Division- Statistics Section <sup>91</sup>

<sup>91</sup> Kandil, p. 175

## Tha'r and Occupation

Although statistics show that almost half of perpetrators are peasants (see table 3), it is not an indicator of poverty or low socioeconomic status. Official data recognize only occupations as written in National Identification Cards. A “peasant” does not necessarily refer to a poor individual: a peasant may own massive areas of land and still be labeled a “peasant.” The Egyptian parliamentary law and 1971 constitution stipulate that 50 percent of members of parliament have to be workers and peasants. Such a rule encouraged many rich land owners to acquire the liable of a “peasant” in their National Identification Cards to gain access to the parliament.

### Occupations of Perpetrators

	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
<b>Peasant</b>	65%	68%	52%	62%	46%
<b>Merchant</b>	5%	2%	.4%	2%	0%
<b>Government Employee</b>	2%	2%	3%	4%	.4
<b>Police Officers</b>	1%	.4%	1%	.4%	0%
<b>Low-ranking Soldiers</b>	.4%	1%	0%	1%	0%
<b>Individuals Working Education</b>	0%	1%	2%	3%	1%

<b>Medicine and nursery</b>	.4%	0%	0%	0%	0%
<b>Fishermen</b>	.4%	.4%	0%	0%	0%
<b>Drivers</b>	2%	3%	5%	3%	3%
<b>Security Personnel</b>	.4%	1%	0%	.4%	0%
<b>Artisans</b>	10%	10%	6%	10%	8%
<b>Unemployed males</b>	3%	4%	7%	8%	11%
<b>Unemployed Females</b>	1%	.4%	0%	.4%	.4%
<b>Student</b>	1%	2%	3%	1%	3%
<b>Armed Forces</b>	0%	0%	0%	0%	0%
<b>Other</b>	3%	3%	1%	0%	1%

Source: General Security Department- Criminal Monitoring Division- Statistics Section <sup>92</sup>

### **Problems with Data**

There are three major problems that should make readers question the ability of the available data to provide an accurate account of the phenomenon, although the data

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<sup>92</sup> Kandil, Alaa' El Din, 175

may provide some insight and helpful information about the phenomenon. Availability of information is problem in research. Data on *Tha'r* is limited to that provided by a special body within the Ministry of Interior called 'The General Security.' Gathering such data and disseminating it, if there is a political will to do so, is among its missions. In a discussion with one of the officials running the police academy research center, he said that even the General Security would not provide researchers or journalists with information and statistics on crimes. They take the initiative to disseminate such information when they want to.

The second problem with such set of data is that the cases reported are the ones where the court has recognized a vengeance case and official justice was sought in the court room. However, cases that are nullified due to the reconciliation are not reported as '*tha'r*' where both parties decide to tamper with evidence and testimonies to nullify the case, as the law does not recognize reconciliation in murder. All testimonies of interviewees admit that people deliberately tamper with evidence and give false and contradictory testimonies to nullify the either when a reconciliation is reached or in case they want to go on with vendetta.

The third problem has to do with punishing real perpetrators and those planning and pushing for the crime. Family leaders and the educated individuals who are considered "valuable elements" in the family may not be "jeopardized" by having them take vengeance with their own hands even though it is the ultimate honor. However, they might be part of the conspiracy through instigation, funding or hiring professional assassins.

Forth, in conflicts where both Muslims and Christians are parties, the police do its best to reach reconciliation for because conflicts of that sort take a sectarian dimension, and the regime for prolonged periods has always been keen on hiding the truth about existing cases of sectarian strife. The real details of the case should be not officially reported. Therefore, it is unclear whether such cases are included into the records or not.

### **Literature on *Tha'r* does not Provide an Explanation**

*Tha'r* is perceived in the sociological literature as a phenomenon that is associated with a sub-culture that is different from the “general culture” predominant in society.<sup>93</sup> Egyptian society includes a number of sub-cultures, in Sinai, Upper Egypt and Nubian culture that is predominant at the Egypt’s southern borders with Sudan. This theoretical perspective assumes that Egypt has a dominant culture and few sub-cultures. Some cultural elements such as *tha'r* are “deviant” from the dominant culture. Therefore, it is legally prohibited. A study conducted by the Center for Social Research Study in Sohag, argued that such “deviant” sub-culture is associated with some other phenomena: the peasant community and agriculture-related professions, belonging to an extended family, settling in the same village for decades without exposure to other cultures, economic hardships and poverty, traditional view of women as subordinates, harsh masculine upbringing of males in society, low educational level.<sup>94</sup>

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<sup>93</sup> Badran, Mahmoud Abdel Rashid and Ahmed Imam Askar, *Al Thakafa Al Tha'reya wa Al Thakafa Al Musalema* (Cairo, Center for Social Studies, 2003), 57.

<sup>94</sup> Ibid, 157-163



Literature on *tha'r* does not tackle state performance in dealing with the issue. Another sociological study <sup>95</sup> rejects to link *tha'r* to state capacity to penetrate society. The reason behind this denial is that *tha'r* has started to take more violent forms. “We would like to assure that a sociological explanation is needed. There are explanations –of *tha'r*- but they are not enough to explain the increase in *tha'r* incidents and the different forms it is taking in a modern society,” Dr. Zayed, the former dean of Faculty of Arts in Cairo University and the famous sociology professor, wrote in the research paper. Dr. Zayed goes on to describe the intensity of violence in the current *tha'r* incidents describing them as more of “gangs’ attacks” or “terrorist attacks.” The paper delves into the details related to the well-known rules of *tha'r* without any explanation. In fact, the author describes the questions demanding an explanation of *tha'r*, the different forms it is taking and the variable affecting it are all “confusing.”<sup>96</sup> Dr. Zayed is the only professor who tackled the question of the relationship between state capacity to penetrate society and *tha'r* but negated the relationship between state performance and the phenomenon.

## Conclusion

Blaming *Tha'r* on poverty, illiteracy and tradition is a misleading conclusion. *Th'r* is indeed a cultural tradition, and most perpetrators are illiterates; however, this is far from being enough to prove that links *tha'r* to illiteracy. Educated family members still commit *tha'r*, but they may not take it with their own hands so as not “sacrifice” the educated members they take pride in. Professional assassins are hired for that purpose. In

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<sup>95</sup> Zayed, Ahmed, “Al Tha'r fi Mugtama' Al Sa'eed fi Al Seyak Al Tareekhy Al Bena'y,” paper presented as part of the sixth annual conference of the National Center for Social and Criminial Studies entitled “The Social and Criminal Dimensions for Development in Upper Egypt,” Cairo, 18-28<sup>th</sup>, April 2004, 937-55.

<sup>96</sup> Zayed, 937

addition, limiting the scope of research to focusing on the social drives for *tha'r* means ignoring one of the most important actors involved in the phenomenon, the state. Ignoring the interaction of the main state institution that assumes the function of maintaining order in society, the police force, leads defiantly to deformed results.

## CHAPTER IV

### POLICE AND THA'R

The police is an “organized civil force” responsible for the maintenance of public peace, safety and order.”<sup>97</sup> It is a function necessary for civilized coexistence among citizens. Even though it is an indispensable public good, law enforcement officers are never popular to the constituency they are serving because they are vested with “wide ramifications” that affect people’s freedoms. Law enforcement agents are endowed with the power to use violence in the form of “collecting and communicating intelligence affecting public peace,” preventing offences to the public peace, arresting and detecting offenders and eventually bringing them to justice. It keeps order in public places and prevents dangers and damages to the citizenry. Any abuse of these powers has serious effects on people’s freedom as well as their sense of security and justice in society, a problem that is aggravated if there is an authoritarian regime in power. However, due to the justified public cynicism towards any security institution that is due to the long record of human rights abuses, democratic states tend to impose restrictions on the functioning of the police to protect the citizenry and prevent this huge institution with immense powers from bullying society.

Taking vengeance outside of the state system by killing the murder or one of his/her relatives or family system is a clear and blunt violation of the law. It is considered deliberate first degree murder punishable by death according to article 230 of the Egyptian Criminal Code. The data provided by the Ministry of Interior suggests a very high rate of case-solving and arrests of

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<sup>97</sup> Rai, Haridwar, “Dual Control of Law and Order Administration in India: A Study in Magistracy and Police Relationship,” *Indian Journal of Public Administration* (January/March 1967)

murders. However, the problem with such data, as detailed in the previous chapter, is that it is limited to those cases where there were arrests and court decisions only. In reality, an unidentified number of cases are deemed null due to reconciliation or customary tribunals. In fact, most customary “judges” interviewed say that the police demand their intervention in “most” of the crimes that take place in villages.<sup>98</sup> With this in mind, one can only be highly skeptical of the data provided below by the Ministry.

As for those actually arrested and convicted, it is hardly possible to suggest it is due to hard and sophisticated police work. Because taking vengeance is a source of pride, it is easy to pinpoint the perpetrator who takes pride in committing the “murder.”<sup>99</sup> Furthermore, police officers closely monitor the map of family adversaries to be able to predict future troubles given the history of animosities and competition in each village. Such monitoring gives a room for police officers to sponsor reconciliations in hotspots for conflicts.

Interviews reveal police brutality and threat of using violence against the families of criminals is what blackmails them into turning themselves voluntarily to save their wives, mothers, children and other family members from torture and arbitrary detention.

Not only is *tha’r* dangerous to people’s lives, it is associated with other crimes that are widespread in Upper Egypt. Therefore, it is imperative to understand how the police force deals with the phenomenon. The police force suffers internal institutional problems that affect its ability to perform its basic function of upholding rule of law and achieving security. These problems are low salaries, lack of sophisticated investigative tools and techniques, poor

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<sup>98</sup> All customary judges who responded to interviews said that most, if not almost 80 percent of cases they adjudicate in, are passed along by the Police.

<sup>99</sup> Alla’ el Din et al (2002)

supervision, non-existent coaching, harsh working conditions and lack of awareness of human rights

### Percentage of Police Arrests of the Accused

Year	Total Number of cases	Number of cases where all were caught	Number of cases where some were arrested	Murderers are known but still at large <sup>100</sup>
1997	85	75	3	3
1998	91	88	1	2
1999	69	57	8	4
2000	80	71	3	6
2001	72	62	2	8

Source: Statistics Department, Criminal Investigation Unit, General Security Division<sup>101</sup>

### Other Crimes Associated with *Tha'r*

*Tha'r* results into the spread of other crimes such fraud, perjury, the emergence of professional assassin's, bribes and mediators who profit off fights. Both taking vengeance and the informal reconciliation necessitate the disruption of the legal process. If the family of the deceased is determined to take vengeance, formal documents that could build a case against the murderer are irrelevant. Therefore, they give false testimonies that the deceased had no enemies

<sup>100</sup> Have not been caught

<sup>101</sup> Kandil, Alaa' El Din, Ghaleb Abdel Gawad, Amr Hany and Amr Zaki, "Hagm wa Mustakbal Thaherat Al Tha'r fi Misr: Derasa Ihsa'eya Tahlileya," (Police Training Institute: Police Academy, 2002), 180.

and refuse to accuse anyone. If they reach reconciliation with the other family, there is a need to drop the criminal charge. And since that is not legally possible in crimes, the only way is to deem the case null by forgery and false testimonies. Most dangerously, a stratum of professional killers who get paid generously has emerged, and therefore nurturing and providing a lucrative market for the most dangerous criminals.<sup>102</sup> Other crimes also emerge such as bribes and the interference of power-seeking abusive figures who profit off bloody conflicts called “blood merchants” or ‘*tuggar al dam*’ who make it a job to aggravate animosity between parties to facilitate arms trade and take commissions from all parties. Police officers note that there are a number of people who voluntarily intervene for reconciliation, but in fact, they profit off the situation. Some intervene only to gain political grounds in elections by allying with certain families and acting as lawyers rather than arbitrators.<sup>103</sup> Interestingly, those people may be called upon to become ‘*urfi*’ who is supposed to reach reconciliation and restore peace.” However, the most important and dangerous business emerging out of ‘*tha’r*’ is arms trade.

### **The Weapons Question**

The question of weapons in ‘*tha’r*’ is a critical one. Possession of weapons is an integral part of Upper Egyptian life. Almost every Egyptian citizen in Upper Egypt has weapons. Poverty is not an obstacle to owning weapons. In an interview with a retired Brigadier General and a senior figure in ‘*Nazza Karar*’ village in ‘*Manfalout*,’ Mohamed Reda, he said that weapons especially machine guns are so common that some people sell some of their land to buy them. Sheikh Saad, one of the sheikhs and prominent figures of Al ‘*Mandara*’ who assumes the rule of a customary arbitrator, mentioned a story of a young, new officer who went to ‘*Al Mandara*’

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<sup>102</sup> Kassem, 37

<sup>103</sup> Kassem, 36

recently after he joined the police force saw a number of citizens holding weapons in a microbus. The officer stopped the bus and asked for their gun-possession licenses. People refused his request, and a conflict erupted between the small police force and those in the bus resulting in a few injuries. Sheikh Saad said that senior officers interfered to ease the tension and “explain the situation on the ground” to the “inexperienced” officer who did not realize that weapons are an integral part of life. In fact, all interviewees admit they have “legal” weapons in their position, but they never use them unless they are travelling at night where they could be of danger of gang attacks.

Weapons exist without an accurate estimate of the amount of legal and illegal weapons. There is no official estimate or at least an official public statement indicating how much of the weapons used in Upper Egypt is smuggled from abroad. However, literature in Police Academy Research Center and other newspapers indicate that police and army storage houses are primary sources of weapons.<sup>104</sup> Storekeepers may resort to filing phony reports that storage houses were robbed, and weapons and live ammunition confiscated are stolen. However, when an inventory is run, some cases are revealed.<sup>105</sup>

Arms trade, especially machine guns, is a lucrative business in Upper Egypt. Sophisticated arms make it easy to shoot accurately the “target.” It is also a method of telling everybody in the village that the vengeance is taken and duty fulfilled.<sup>106</sup> Possession of unauthorized weapons is illegal and punishable by law; however the law does not authorize possession of machine guns. Possession of one machine gun is punishable by a 25 year sentence

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<sup>104</sup> Kassem, Hesham Naguib Ahmed, (2002), *Al Tha’r Ka Gareema Ejtemae’eya wa Atharuha Ala Al Amn Al Am, Kadaya Amneya Mu’asera: Al Mathaher wa al Aba’d* : Police Training Institute, Police Academy, 37

<sup>105</sup> Kassem, Hesham , (2002)

<sup>106</sup> Alaa el Din (2002) p 195.

in prison. The geographic features of the area help the arms trade flourish. Cities and villages around the river Nile are surrounded with steep cliffs rising on either side with deserts. In the valley, the land is fertile but the area around is desert land. The complex geographic structure of the mountain makes it easy for arms dealers to smuggle weapons. In addition, weapons are usually buried in remote and abandoned areas to be out of sight. This is the main reason why police campaigns searching for machine guns in households usually fail to capture them.<sup>107</sup> Sudden or surprise campaigns to capture illicit weapons do not work because people bury such illegal weapons in distant remote areas deep in earth, and when parties to a certain conflict are called to the police station to deliver their weapons, they buy other cheaper and low quality ones to turn in to the police.<sup>108</sup>

### **Tha'r in Police Literature**

Police Academy literature tends to classify '*tha'r*' as a sociological phenomenon. Research written by police officers is helpful in identifying how police officers view Upper Egyptian society as well as the phenomenon itself, how the security institution should handle the crises and the role of other societal stakeholders. Research in the Police Academy Research Center attributes the spread of '*th'ar*' to the social system and inherited traditions. Some go as far as arguing that that harsh punishment are useless since taking '*tha'r*' is a matter of dignity, as perpetrators realize that they would be executed for such a crime, but still they prefer the social pride.<sup>109</sup> The ready-made old remedy lies in expanding education and religious awareness. For education to be an effective tool to combat '*tha'r*,' it "should consolidate the feeling of

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<sup>107</sup> Kassem, Hesham Naguib Ahmed, p. 26-7.

<sup>108</sup> Kassem, 28.

<sup>109</sup> Alla' El Din (2002), p. 209.



individuality and independence from the group.<sup>110</sup> Furthermore, more effort should be exerted to raise religious awareness of the rules of ‘*kassas*’ as opposed to ‘*tha’r*’ using different possible means.

One of the research studies handling the question of ‘*tha’r*’ as well as most interviews focus particularly on the role of women in encouraging men to take vengeance where men who want to prove “manhood” have to look masculine in the eyes of women. General Reda of *Nazza Karar* complained that the role of women saying that they may even refuse to have sex with their husbands as long as they have not taken ‘*tha’r*’ and refuse to cook for them. “She keeps nagging and crying,” said General Reda showing how wives, mothers and sisters they use emotional pressure on men of the family.

### **Police Literature Recommendations to Handle Tha’r Problem**

The ready-made fixed set of recommendations in police literature is two dimensional, a role given to the police institution and another to the state and society in general. There are certain recommendations on how to handle the ‘*tha’r*’ question that most literature on the subject shares. In fact, there was a great deal of repetition from one piece of research to the other.

Police Academy literature on Tha’r is characterized by three features, lack of well-thought out and studied discussion of each and every recommendation to handle ‘*tha’r*’ problem, no innovation and repeating the same ideas presented in older piece of research and conventional wisdom and giving the Ministry a socio-political role in addition to their ordinary security function. The literature draws a “security strategy” for Upper Egypt that is made of a number of

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<sup>110</sup> Ibid.

recommendations to properly use the Ministry's resources to handle 'tha'r' problem. These recommendations are:

- 1- Using emergency law instead of the complex and slow legal procedures.
- 2- Sponsoring the security reconciliation attempts known as "*Al Musalahat Al Amneya*" to avoid future conflicts and supporting "Customary tribunals" where major family heads and customary "judges" interfere to reach reconciliation. The ministry actually put forward rules to handle such tribunals that would be elaborated upon in detail below. In fact, such a step could turn the police into a party playing a political role and strip it of the impartiality it should have in order to be able to perform its job of law enforcement. The chapter that handles customary tribunals provides more insight on the issue.
- 3- Building "good relations" with influential figures inside villages and governorates and "raising their status within the limits of law to facilitate efforts of the police."<sup>111</sup> However, such "good relations" and the boundaries for cooperation are not defined, which raises questions regarding the integrity of the police force in dealing with different social actors and citizens. It implies that some citizens are more important than others.
- 4- Drawing maps of animosity and identifying the most vulnerable areas and families most likely to engage in a fight.
- 5- Constant inspection campaigns searching for weapons targeting those most likely to take vengeance.

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<sup>111</sup> Ahmed Mohamed Badr Hussein et al (2002), "Ashkal Al Kasswah bi Marakez wa Aksam Al Shurtah: Al Asbab wa Al Muagaha,: Kadayam Amneya Mu'asera: Al Mathaher wa al Aba'd : Police Training Institute, Police Academy, p. 214-5.

- 6- Reducing the number of weapons licenses given by the Ministry of Interior
- 7- Pinpointing individuals who ignite the fights and encourage violence.
- 8- Improving the number of informants inside villages and among families to be able to predict potential violent actions and attempting to prevent them
- 9- Improving performance on the borders and the desert areas surrounding villages to prevent arms smuggling
- 10- Increasing police force inside villages to make state power visible to people.

There are plenty of problems with these recommendations. First, while improving the skills of police officers to handle the ‘*tha’r*’ issue is mentioned frequently in different sources, it is mentioned without spelling out how that could happen and specifying areas that needs improvement in police officers. Second, some recommendations strip the police of its one unique characteristic that it should have to be able to perform its policing function, neutrality. A police force is one executive arm of the state and the agency assigned by the state to enforce rule of law. Therefore, impartiality and equal distance from all parties is necessary for it to maintain its credibility and respect. Suggestions such as building and sometimes “improving” relations with families turn the police institution into a party to a conflict.

The most dangerous of all these recommendations is the question of expanding the use of emergency law that was used as umbrella to cover many violations, human rights violations as well as to tighten the political grip of the regime. Most importantly, it is used extensively, according to many human rights reports and interviewees, in detaining the relatives of a fugitive (especially women) to force him to turn himself in as interviewees said.

## Police-Sponsored Reconciliations

Police-sponsored reconciliations are administrative tools to reach peaceful resolutions for conflict rather than legal ones. The Minister of Interior – Al Nabawi Ismael at that time-issued a decree 579 for the year 1978 (579/1978) handling police reconciliation committees at different administrative levels, the first is at the village level in the countryside. The second is at the ‘*Sheyakha*<sup>112</sup>’ level (in the city). The third is at the district level (in the city) and finally at the governorate level. Each committee is headed and administrated by police officers of different ranks who supervise the reconciliation process in their areas under their jurisdiction. The structure is as follows:<sup>113</sup>

### Reconciliation Committees at Different Local Administrative Levels

Administrative Level	Composition of the Committee	Status
At the Level of Village	<ul style="list-style-type: none"> <li>▪ Head of the Police Station</li> <li>▪ Two citizens chosen by both adversaries parties</li> <li>▪ The preacher (the Omdah<sup>114</sup>)</li> </ul>	Head  Members  Member
At the Sheyakha Level (an area inside the city known for being under the supervision of	<ul style="list-style-type: none"> <li>▪ An officer from the Police Station Assigned by the Head</li> </ul>	Head

<sup>112</sup> Sheyakha is usually composed of one or few streets in a certain district. It is inherited from an old tradition where each street or two had a “sheikh” or a leader.

<sup>113</sup> Cited in Youssef Hamdeen et al, (2004), Nash’at wa Asbab Thaherat al Tha’r: Training and Development Institute, Police Academy, p. 36

<sup>114</sup> Omdah is an administrative task in villages. He is a government representative in the village and at the same time he is one of the public figures who is respected and maybe feared in society. The Omdah system emerged in the Ottoman era and it underwent different changes in times till it became a public post. There are laws governing the work of Omdas. However, interestingly, police literature refers to the Omdah as a preacher *الواعظ* even though he is not a preacher in the common perception of the term. It is unclear why the Ministry gives him that label.

a popular old figure called “sheikh”)	of the Police Station <ul style="list-style-type: none"> <li>▪ A member in the local council</li> <li>▪ The preacher (Omdah)</li> <li>▪ A social worker ( اخصائى اجتماعى )</li> <li>▪ Two the citizens chosen by the adversaries</li> </ul>	Member  Member Member  Member
At the District Level (Inside the city)	<ul style="list-style-type: none"> <li>▪ Head of police station or head of the investigation unit</li> <li>▪ Member of the local council</li> <li>▪ Member of the local center</li> <li>▪ Preacher</li> <li>▪ Social worker</li> <li>▪ Two citizens chosen by the adversary parties</li> </ul>	Head  Member  Member  Member
At the Governorate Level	<ul style="list-style-type: none"> <li>▪ Head of security department in the governorate ( مدير الأمن )</li> <li>▪ Head of the security committee in the governorate رئيس لجنة الأمن فى المحافظة</li> <li>▪ Head of the police station</li> <li>▪ A social worker</li> <li>▪ Preacher</li> <li>▪ Two of the citizens chosen by adversaries</li> </ul>	Head Member  Member Member Member Member

Source: Cited in Youssef Hamdeen et al, (2004), Nash'at wa Asbab Thaherat al Tha'r: Training and Development Institute, Police Academy, p. 36

The ministerial decree stipulates that the Ministry should also be keen on “properly” selecting individuals involved in the reconciliation process making sure they are reputable and honest; however, there is no guarantee on the seriousness of all parties to abide by the agreement reached.<sup>115</sup>

### Number of Reconciliations to Total Tha’r Cases

Year	Number of Tha’r Incidents	Number of Reconciliations	Remaining	Percentage of Reconciliations to total Cases
1997	266	157	99	37.21
1998	216	133	86	39.26
1999	214	123	91	42.52
2000	208	84	124	59.61
2001	259	144	115	44.40

Source: El Beily, Ezzel Din, Ahmed et al. (2002), “Gareemat Al Tha’r,” *Ph.D. dissertation*, Mubarak’s Academy, School of Training and Development, 111-7.

There are plenty of problems with Police-Sponsored reconciliation attempts. First, the short period officers spend in Upper Egypt reduces their incentive to finish the jobs at hand, properly ending the reconciliation, leaving the problem to a new officers who is not involved well enough in the conflict in terms of, history, circumstances, nature of the parties to the conflict and power structure in the place.<sup>116</sup> Second, officers may lack experience in reconciliation. Lack of experience may be manifested in their inability to properly determine which parties are susceptible to more pressures than others. What matters most to some officers

<sup>115</sup> Cited in Hamdeen, (2004), p 36

<sup>116</sup> Kassem, 54

is registering in the Ministry's documents that they contributed to a reconciliation for a fast praise.<sup>117</sup> Third, police may not be able to properly choose members of the reconciliation committee, which may result into the infiltration of one member who could aggravate the problem.<sup>118</sup> In addition, there is a question of quantity versus quality; officers care a lot about the quantity of reconciliations rather than the quality and sustainability.<sup>119</sup> Therefore, pressure might be exercised just to get done with the reconciliation and get the praise without actually considering any form of justice. The reality on the ground means that the powerful parties would get preferential terms in the reconciliation. The weaker parties on the other hand do not have the power to go on with the animosity. Change of circumstances does play a role in the final results. A party travelling abroad, parliament members getting out of office, the death of a powerful leader would necessitate one party giving up some of their rights. Change of such circumstances may affect the post-reconciliation period. Fifth, while forcing parties to agree to reconciliation or forcing them into implementing it, some "gross violations happen during inspection campaigns" the most dangerous of which are "unlimited assault" on people.<sup>120</sup> Sixth, some parties may be interested in aggravating the problems by drawing a wedge among families by leaking news about the weapons they possess, their types and paces of hiding them. Seventh, some mediators between the police and the people on the one hand and between adversaries on the other may emerge trying to profit off the conflict. They are mostly arms traders who provide adversaries with malfunctioning weapons to deliver to the police instead of the real working machines guns. People do that to avoid the "horrors associated with them [inspection campaigns]." Eighth,

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<sup>117</sup> Kassem, 54

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> The original phrasing is a very harsh statement that admits the possibility of making grave human rights violations. In Arabic, it is written as follows "إطلاق اليد في التطاول على الأعراس"

rushing into making the reconciliation is harmful, since it is not routine work. Such cases are sensitive, and a certain degree of wisdom has to be there while handling them.<sup>121</sup> Ninth, sometimes police officers choose to refrain from attacking highly criminal spots where there are highly influential and armed and dangerous criminals famous of resisting authorities.<sup>122</sup> Instead they run campaigns over areas adjacent to these highly criminal spots and collect illegal weapons. Finally, officers' lack of interest in learning the social and political conditions surrounding them, which results into a sense of frustration that they are not interested in people's livelihoods.<sup>123</sup>

### **Institutional problems within the Ministry of Interior that Aggravate Tha'r**

The Ministry of Interior suffers many institutional problems that affect its performance and resorts to political and sometimes brutal means to achieve high arrests rates and achieving "peace." Officers suffer immense pressures, low salaries, lack of sophisticated investigative tools and techniques, poor supervision and lack of awareness of human rights. Furthermore, a number of institutional factors make officers who work in Upper Egypt lose interest in fulfilling their duty. As a result, officers may be forced or driven into assuming a political role or committing grave human rights abuses.

### **Problems Cited by Police Officers**

Police officers are under immense pressures to work for extended hours in harsh conditions. They are also put under the pressure from their superiors to deliver immediate accurate result of investigations and solve cases as fast as possible, which may push officers to use violence

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<sup>121</sup> Ibid., 55

<sup>122</sup> Ibid., 56

<sup>123</sup> Ibid, 40



against citizens. However, literature suggests that “the more experienced the officer is, the less he is inclined to use violence against citizens.”<sup>124</sup> As a result, officers may not have enough time to properly investigate the case and evaluate evidence. Not being able to meet deadlines may drive a police officer, especially the young and inexperienced into “irresponsible acts” that could “turn the officer into an accused to be punished.”<sup>125</sup> In other words, he might forge evidence or torture people for confessions, and if caught, he might instead of catching criminals become a criminal himself. Even torture or “excessive violence” as the literature prefers to label acts of violence against citizens, may not help the investigation, as some suspects can confess crimes they have not committed only for torture to stop. An officer’s worst nightmare is negative feedback from his superiors and the annual statistics indicating failures especially failure to solve cases.<sup>126</sup>

The Ministry has modern tools that could enable police officers to solve cases and bring perpetrators to justice; however, for an unknown reason, they are not used. Such tools range from Criminal Laboratory Analysis, Forensic Laboratories, Criminal Photo Databases and others. Each technical tool could provide reports that cover different elements of the crime. These department exist; however, they are not modernized enough to fulfill their function.<sup>127</sup> Forensic specialists can determine the cause and time of death, the way the crime was committed and the weapons used. There are also experts in analyzing the crime scene in terms of fingerprints, DNA tests, footprints and different findings in the scene. Not only can such tools enable the police officer to solve the case but also guarantee proper procedures to avoid nullifying the case.<sup>128</sup>

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<sup>124</sup> Ahmed Hussein (2002), 136

<sup>125</sup> Ibid (2002), 136

<sup>126</sup> Ibid (2002), 169

<sup>127</sup> Ibid, 135

<sup>128</sup> Ahmed Hussein (2002), 135.

Most importantly, if the police authority has such tools, officers would not need to torture suspects, witnesses and their relatives to get confessions. In addition, officers are required to perform different tasks simultaneously. He might be working on a case and right after, he is assigned another like protecting high officials' commutes known in Arabic as '*Tashreefat*,' a football match, protecting mosques and other tasks leaving no time to properly investigate a case."<sup>129</sup>

Officers suffer lack of proper professional coaching and supervision from superior and more experienced officers. Therefore, it is noticeable that torture or "excessive violence" cases are committed by young "hasty" officers who have not received enough and proper training in criminal investigation. No meetings are held with young officers who joined the force recently for guidance. Higher Ministry officials are to blame also for not giving orders to coach young recent graduates.<sup>130</sup>

Only recently after various criticisms to the Ministry of Interior of using systematic torture against citizens did the Ministry start giving officers courses and trainings on Human Rights laws and regulations; however, such attempts have always been met with a great deal of skepticism from human rights organizations, opposition and public figures. A number of human rights organizations have emerged to deal with cases of human rights abuses. A large number of lawyers volunteer to provide legal services in support of detainees and victims of abuse. Many of these organizations issue reports that carry the testimonies of victims of abuse and their families. Sometimes, activists managed to get hold of videos of abuses that circulate social media. Despite the Ministry of Interior's continuous effort to confirm that such cases of abuse are "individual

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<sup>129</sup> Ibid (2002), p. 136.

<sup>130</sup> Ibid (2002)

cases” and do not reflect a pattern, police violence has become, in time, well-known knowledge displayed frankly even in some movies.

Furthermore, the number of police personnel and officers in each police station is very limited (around 10), and it is hard for them to move around in villages and geographically rough areas. Central Security Forces cannot reach these areas easily. Finally, large areas lack vital public services such as paved streets provided with lights especially in villages and remote areas, which makes it hard for a smooth police patrolling and makes communication tools among officers weak. Such an atmosphere encourages more law evasion and disrespect.

### **Choice of officers working in Upper Egyptian villages negatively affects the security situation**

Certain institutional factors however negatively affect the performance of officers assigned to work in Upper Egypt Upper Egyptian villages, the areas well known for being of the worst places police officers may work. Hot weather, poverty and harsh working conditions are all factors that make Upper Egypt an undesirable place for officers to work in. In the mean time, there are rules against having police officers work in their own villages. The Ministry, in theory, recognizes the need for impartiality of officers in regard to family grievances. Therefore, officers cannot work in their home towns or villages to avoid any potential bias towards certain community members at the expense of others. Therefore, officers who work in Upper Egypt are mostly from Northern Egypt or other governorates of Upper Egypt.<sup>131</sup> As a result, working in Upper Egypt is an obligatory temporary assignment or a punishment for making a mistake. The temporary assignment last mostly for three years. In the first year, an officer is focused on

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<sup>131</sup> Hamdeen, (2004), 40

merely understanding the cultural and political setting in the village. In the second year, he starts witnessing a great deal of frustration and immense work pressures. In the third year, he may not be interested in working hard and delivering anxious to the moment he leaves the area. Such an environment strip officers of the motive to work hard or deliver proper results. The other type of officers in Upper Egypt is those punished for making a mistake, which implies inefficiency or bad conduct. This means that the area in dire need for security is entrusted to less competent police officers.

### **The Torture Question**

The torture question is not an independent phenomenon resulting from inherent sadist tendencies; it is also an outcome of the entire institutional structure of the Ministry. In terms of torture and human rights abuse, the police force in Egypt has a very bad reputation. Both domestic and international human rights activists and institutions have documented and criticized police brutality accusing it of using “systematic torture.”<sup>132</sup> Torture is not limited to punishing political opponents to Mubarak’s regime. International and local human rights organizations have issued hundreds of report reporting abuses and collecting data and gathering evidence and testimonies. They managed to go in public with some grave cases and violations where police officers tortured citizens whether for political reasons or to force them to confess crimes. It might even be cases of power abuse driven by personal interests of police personnel and officers.

Human rights activist accuse the police of mass arrests, keeping detainees in custody and torturing them forcing them to give specific testimonies. Police officers do not believe in the proper investigative technique of collecting evidence and facing suspects with them until they

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<sup>132</sup> Azmat Al Koshh Bayna Hurmat Al Watan wa Karamat Al Muaten, Cairo Center for Human Rights Studies, Korrasat Ibn Roshd (1999)

either confess or the public prosecutor approves to have the case turned to court for a trial. “They only recognize the number-one piece of evidence, confession.”<sup>133</sup>

### **Sense of Victimization**

In addition to the harsh working conditions the Ministry creates for officers to function and the low pay, police officers take the blame for political and social turmoil which creates a deep sense of victimization on the part of officers. There is a dominant sense among police officers that their efforts and “sacrifices,” working in harsh condition for long hours and very low salaries serving the country, are not appreciated. Instead, they take the blame for any politically-destabilizing incident that is most probably the result of political failure of the regime in meeting people’s demands. Such a an environment adds to the pressures police officers suffer from which eventually makes them focused on keeping their job and barely performing their tasks fast irrespective of the potential human rights abuses or even the quality of products delivered. There are plenty of examples that demonstrate the political pressures exerted on the police force to shift their focus from their original job of securing people into protecting the regime. The police force has always borne the responsibility for any threat against the regime. Political turmoil is blamed solely on the police force, and major officers are the ones who may lose their jobs and reputation over failure to curb and/or quell any form of turmoil. Testimonies of Ministers of Interior in different media outlets, interviews, as well as their diaries show that such incidents are their worst nightmare. The police force has suffered certain dramatic failures that threatened, if not caused, ministers to be ousted. In 1965, the Military Investigative

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<sup>133</sup> Hassan, Essam El Din et al. ed. *Azmat Al Koshh Bayna Hormat Al Watan wa Karamat Al Mowaten*, Korrasat Ibn Roshd: Cairo Institute for Human Rights Studies (CIHRS), p. 14.

Authorities ‘(*Mabaheth Askareya*,)’ allegedly revealed a conspiracy against the regime by the Muslim Brotherhood, and Sadat, as a member of the Free Officers Movement” blamed the police for not being aware of it. Both institutions went into lengthy verbal conflict or competition over who discovered the conspiracy.<sup>134</sup> The second failure of the police force is the failure to quell the rebellious movement against the Egyptian control over Syria resulting into the dismantling of the union between Egypt and Syria in 1968. In 1958, Egypt under Gamal Abdel Nasser managed to create a union with Syria and called it, the United Arab Republic (UAR) under one flag. Nasser adopted some economic and administrative policies that aim at centralizing decision making that were not favorable in Syria. A number of army officers in Syria were resentful, and as a result, they managed to achieve a successful military coup on 1961, and Syria gained its independence from Egypt. The third major failure is the inability to discover militant Islamic movements early enough to avoid the terrorist attacks that took place in the eighties and nineties. Diaries of former ministers of interior reveal severe internal conflicts regarding the way the Ministry dealt with militant Islamic movements especially after the assassination of Sheikh Al Thahabi the prominent Islamic scholar who was well known for attacking extremist militant movements in 1977. Some officers favored initiating talks with Islamists, while others were for using violent attacks against them.

The police force was also blamed for not being able to “contain” the public protest against price hikes declared in January 17<sup>th</sup> 1977. The events were a direct spontaneous public reaction against raising the price of basic foods; mass riots erupted in different parts of Egypt, and mass arrests followed it. President Anwar Al Sadat released a large number of prisoners, and

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<sup>134</sup> Al Gawadi. 2003, 160-9.

the Minister of Interior Sayed Fahmy was ousted.<sup>135</sup> These events left a bad memory. Despite the poor handling of the situation, the Ministry of Interior did not create the political problem that caused the riot. Since then, the police community became vocal about their major complaint, bearing the cost of others' (politicians) mistakes. Al Nabawy Ismael thought that sustainable security is achieved only with providing the people with their needs and bettering their living conditions. As a Deputy Minister, before becoming the Minister of Interior, he volunteered to lead negotiations with merchants when prices got high.<sup>136</sup> Police officers are becoming vocal about this feeling of victimization. Politicians and public administrators take bad decisions, but the police bear the cost when people protest. Traffic jams occur due to bad urban planning. Thar or blood vengeance problems in Upper Egypt take place because of a cultural heritage. An irrational behavior on the part of a football fan may cause a disaster.

One of the biggest disasters the institution went through took place in 1981 when the president of the country, Anwar Al Sadat, was assassinated in public, in front of TV screens and among all state key figures during the annual victory parade held in Cairo to celebrate Egypt's crossing of the Suez Canal. There are different stories of the assassination conspiracy, and the police force was accused of negligence and bad performance. Fingers were pointed at Al Nabawy Ismael, (Minister of Interior from 1977-82) due to wrong piece of information and the aggressive strike against all opposition movements that preceded Sadat's assassination.<sup>137</sup> Sadat's assassination was followed by a powerful wave of attacks led by Islamic militant movements. On October 8<sup>th</sup> 1988, there were attacks where 118 police officers and civilians were

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<sup>135</sup> Al Gawadi 2003. 192-3.

<sup>136</sup> Al Gawadi. 2003, 275-6.

<sup>137</sup> Al Gawadi, 206.

killed. Some historical accounts suggest that there was a warning that such attacks would take place, but it was ignored.<sup>138</sup>

One of the biggest blows to the ministry was the internal riot of members of the Riot Police Department. Riot Police soldiers were young unqualified and uneducated peasants who have to perform the military service. The army allows such large and ill-qualified young peasants to join the police force as members of the Riot Police responsible for quelling demonstrations and strikes. Sometimes they might help in daily police functions and get deployed in places like resorts in the summer and on Eid celebrations in need for more men on duty arises. They were ill paid and suffered harsh conditions. In the mid eighties, there were rumors that they will be required to stay for one more year. They rebelled and attacked civilians resulting in about 36 deaths and hundreds injuries in different parts of Egypt.<sup>139</sup> The blame the Ministry has received after all these events forces the institution to shift its attention to political functions that are not, in essence, theirs. They only come to bear the cost of the political failures of the regime when having to crush opposition. All such incidents in fact constitute part of the institutional memory of officers that consolidate their sense of victimization.

## **Conclusion**

The way the police force handles conflicts in Upper Egypt is influenced by the lens through which the police force views the social setting prevalent. The police force in Egypt perceives the '*tha'r*' as a purely sociological phenomenon that requires social and political remedies rather more than a security problems blaming all spread of *tha'r* to old decedent traditions and lack of religious awareness. Such a perception has pushed the police institution to

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<sup>138</sup> Al Gawadi, 206.

<sup>139</sup> Ibid



adopt social and political tools to solve the problem deviating from their real function, law enforcement. To solve cases, instead of using the various criminal investigation tools, the police force is working in a totally different venue, customary tribunals and their main tool for imposing reconciliation on all conflicting parities is threat to use arbitrary detention and torture.

However, while officers blame traditions, there are institutional problems within the Ministry of Interior that makes it hard for officers to perform their main duty. Officers do not have enough technical facilities to help with criminal investigation in order to surround suspects with evidence rather than torture them to confess. Officers suffer very harsh working conditions, lack of coaching and proper supervision. In the mean time, they suffer a deep sense of victimization for having to pay for the political failures of the regime in all walks of life. They have been blamed for all regime-threatening incidents, and therefore, the Ministry has shifted the focus from securing the community to securing the regime.

## CHAPTER V

### LOCAL SYSTEMS OF CONFLICT RESOLUTION: A TOOL SERVING

#### AUTHORITARIAN CONTROL

While the previous chapter refuted the culturist argument explaining ‘*tha’r*’ by cultural norms, this chapter will delve into the institutional factors inside the Ministry of Interior and the informal means of customary tribunals that contribute to rather than help reduce ‘*tha’r*’ rates. Although culture plays a role in consolidating the habit of taking vengeance, ‘*tha’r*’ is closely associated with economic and political considerations prevalent in Upper Egyptian villages. The informal system of conflict resolution, whether in the form of personal relations or customary tribunal serves as a political tool for political control because they do not serve justice but rather further a political process of consolidating existing power structure at the village level, and they reflect the failures of the Ministry of Interior to enforce rule of law.

#### **Land and Economy: Why Conflicts Erupt**

Since Upper Egypt has always been an agricultural economy, the history of *Tha’r* and conflicts in Upper Egypt is closely associated with the development of land ownership laws. The smaller the land gets and the poorer people become, the stronger the competition for land is. It also lessened the financial gap among families and intensified competition. Consequently, power and prestige are directly associated with wealth (i.e. land ownership and all relevant agricultural facilities such as access to water and other services). Most conflicts, especially ‘*tha’r*’ problems and the old inherited grievances are owed to conflicts over land and access to services such as access to water and other land-related services. While grievances are not linked to the post-1952

coup land reform initiative, it intensified drastically afterwards. The larger the land, the more powerful and richer the owner is.

Before the 1952 coup d'état, land ownership was concentrated among families and controlled by a small number of family members. Women in Upper Egypt were not entitled to inherit the land. Only male siblings inherited. After the Agricultural Reform Law issued in September 1952 by the Nasser as part of the social reform and wealth distribution limiting land ownership of the feudalists and distributing their land to poor peasants who suffered extreme poverty under feudalist control. The law limited individual ownerships to 200 'feddans.' The beneficiaries were tenants, estate workers, and the poorest villagers. The law fixed rents, set tenancy duration at a minimum of three years, and established a minimum wage. The law was followed by other ones in 1961 and 1969 that deepened the reform and further reduced the maximum size of landownership reducing the ceiling of ownership to 100 'feddans' then 50 'feddans' in 1961 and 1969 respectively. As a result, more than 700.000' feddan's were distributed across the country amounting for about from 12-14 percent of cultivated area. Around 341.000 families benefited from the new law<sup>140</sup> As a result, the map of wealth and power has changed, and competition has intensified.

Sadat launched a fierce attack on the law and returned large amounts of land to their original owners before 1952 land reform. According to interviewees in the village visted 'Al Mandara,' conflicts peaked during that time. Many peasants refused to lose the benefits acquired due to the socialist land reform of Nasser. In addition, with the relative spread of education and increased literacy levels, some families recognized the legal and religious right of women to

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<sup>140</sup> Helen Chapin Metz, ed. *Egypt: A Country Study*. Washington: GPO for the Library of Congress, 1990.  
<http://countrystudies.us/egypt/85.htm>

inherit their land which resulted into further shrinking of the size of land inherited and dispersed distribution of property. With reduced property, comes reduced power. Therefore, male siblings in the family fight hard to keep their land intact without dispersion and division even at the expense of their female siblings and neighbors.

### **Securing Property: Historical review**

In a self-help environment, Upper Egyptians have always been used to relying on themselves to secure their land, cattle, property and lives against aggressors which justifies the widespread of weapons as a norm. When the state “showed up in the 1980s and 1990s, it was mainly for political reasons, and therefore, the sole agent of the state in Upper Egypt, the security institution at the time, chose to solve the political problems using political means rather than paying attention to real security issues of the people. The state existence in Upper Egyptian villages was very minimal in different walks of life. In the village, *Al Mandara*, interviewees said that state services such as electricity, health services and roads were introduced first in the eighties. Before then, attention was given to Upper Egyptian major cities where the Nasserite regime was keen on expanding education and state services to all these cities.

*‘Tha’r’* and security problems cannot be discussed without tracing the history of land protection in Upper Egypt. At the time of state building at the beginning of the nineteenth century by Mohamed Ali, there were attempts to achieve stability of the politically-sensitive areas but little was done to achieve communal security at the village level. In 1805, he established an entity called the ‘Governor’s Office’ or *‘Diwan Al Waly’* that was responsible for

maintaining order, control and dispute resolution among citizens headed by four “*Ulama*<sup>141</sup>” representing the four Islamic schools of thought ‘*Mathaheb*’ as judges in crimes and inheritance issues. Mohamed Ali also introduced an “unorganized force” called ‘*Al Serswary*’ السرسواری to perform the pursue offenders and preserve public peace in Cairo and major cities. However, little was documented with regard to the existence of similar forces performing a policing function in villages.<sup>142</sup> By the beginning of the British occupation they were replaced by ‘*Gandurma*’ forces الجندرمة

Historical documents available indicate that peasants were responsible for protecting their own land. Only in the second half the 19<sup>th</sup> century did an informal system of guarding land and animals in villages emerge called ‘*Al Khafar*’.<sup>143</sup> The ‘*Khafar*’ did not emerge as a formal system. They were mere unorganized individuals protecting lands and houses in return for financial compensation from fellahin and land owners.<sup>144</sup> However, the formal security system was weak and almost nonexistent in the villages. In fact, the formal security system evolved from a communal activity to being incorporated by the state gradually and slowly.<sup>145</sup>

The first formal and organized policing system came about however in 1857 when Said Pasha, ruler of Egypt from 1854 - 1863, established the three ministries among which is the Ministry of Interior ‘*Netharat Al Dakheleya*’ in 1857.<sup>146</sup>

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<sup>141</sup>“*Ulama*” is a term used to refer to religious leaders

<sup>142</sup> Helal. 2007, 66.

<sup>143</sup> *Khafar* are the guards who protect people and property in Egyptian villages.

<sup>144</sup> Helal. 2007, 66.

<sup>145</sup> The evolution of the *Khafar* system will be further discussed in chapter 4.

<sup>146</sup> In addition to the Army, “*Netharat Al Jahadeya*” and Ministry of Finance “*Netharat Al Maleya*”

## The Evolution of the community-based security institution, the ‘*Khafar*’ System (نظام الخفر)

The lack of formal security apparatus gave space for a form of security system to be established, a system that the state started to slowly legitimize, organize and incorporate. The term ‘*Khafar*’<sup>147</sup> refers to a type of security personnel that Egyptian peasants used to hire to protect their land, livestock and households. Even though it was created by peasants, by time, it acquired both administrative as well as a security function. The first official reference to *Al Khafar* came about in 1730 when they were assigned the job of collecting money from fellahin and report the strangers who appeared in the village. However by 1844, a law was issued by ‘*Diwan al Maleya*’ (ديوان المالية) (the entity or ministry responsible for state finance) giving the sheikhs<sup>148</sup> the right to appoint the *khafar* and pay them their salaries. More laws were issued to regulate the functioning of *Khafar* such as one that made the sheikhs as well as the *khafar* share the compensation given to peasants for theft. In 1875, due to troubles in organizing the work of *khafar*, the governor of Egypt, Said Pasha, introduced a new system whereby the *khafar* would have a sheikh responsible for their organization with the title of ‘*Sheikh Al Khafar*’.<sup>149</sup> The law also stipulated that each ‘*khafeer*’ should have assigned territories to protect called “*darak*,” and in return for the security service they provide, the peasants used pay the monthly compensation. Each village had its own “*sarraf*” (صراف) who handled public finances in the village to pay to the *khafar*. The *sarraf* was granted the liberty to estimate how much to take from each citizen

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<sup>147</sup> ‘*Khafar*’ is the plural of ‘*Khafeer*’

<sup>148</sup> Sheikhs are the elderly, most respected and most powerful individuals in villages.

<sup>149</sup> This step was part of the process of establishing the laws governing the establishment of a Ministry of Interior for the first time in Egyptian history in the year 1875.

depending on their wealth. Another type of *khafar* also emerged whereby some had no specific *darak* (درك) to protect. They were called ‘*tawafa*’ patrolling during day and night.<sup>150</sup>

*Khafar* did not carry weapons until 1860 when Said Pasha gave them the right to use it. Each had a special authorization describing the weapon taken and the proper use of such weapons would be guaranteed by the sheikh of the village. Only in 1871, did ‘*khafar*’ become linked to the official security institution. Ismael Pasha added a different amendment to the laws giving the “*mudereya*” (المديرية), the state head police department in a city, the right to appoint the ‘*khafar*’ not the sheikhs, and their number should not be less than 5 percent of the total male population in the village. Within each ‘*muderyea*,’ there was a ‘*mufatesh*’ or inspector supervising the work of the ‘*khafar*.’ The amendment made by Ismail also did not give them the right to buy the weapon of their choice but rather take weapons from the ‘*mudereya*.’<sup>151</sup>

Peasants did not rely on the *khafar* though; they used to have their own weapons ranging from sticks ‘*nababeet*’ knives and guns. They used to protect their farms and animals against theft or attack by wild animals.<sup>152</sup> The available historical accounts do not reveal when the official law prohibiting citizens from carrying guns was issued, but a historical document referred to a case in 1849 revealing that there must have been a prior notification to people not to carry guns. In 1853, there was a law organizing the ownership of weapons prohibiting Egyptians and Settled Bedouins ‘*U’rban*’ (العربان) from owning weapons and allowing it for Turks and Wandering Bedouins ‘*U’rban*’ and those performing the pilgrimage. The sheikhs were responsible for collecting the weapons in their areas of control.<sup>153</sup> Organized gangs were “village

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<sup>150</sup> Helal. 2007, 76-77.

<sup>151</sup> Ibid , 74-8.

<sup>152</sup> Ibid, 74-80.

<sup>153</sup> Ibid, 85-91.

specific phenomenon” in Egypt<sup>154</sup>. There were nonexistent in cities. There were gangs in the Delta region as well as Upper Egypt, and there were bloody fights with the *Khafar* and the villagers.<sup>155</sup>

Such community based evolutionary process reveals lack of interest in maintaining security in society. In fact, it left the people, especially the poor in villages under the mercy of the rich and influential land owners who paid “*khafar*.” As a result, the ability of an individual to secure his property is linked to his ability to hire whoever can protect the land and buys them weapons to be able to perform that function. Even though security of life and property is a public good and a basic human right that is the responsibility of the state not the individual, people have to pay for it in Upper Egypt.

### **Modern Police and Securing Land**

The police force is a “new” agent in Upper Egyptian villages. All interviewees, when talking about state existence in Upper Egyptian villages, agreed that police had no visible physical or actual existence in Upper Egypt until the eighties and nineties according to interviewees. Until this very moment, ‘*Khafar*’ system is still existing. The richer the individual is, the more armed ‘*khafar*’ he can get to protect land and cattle. Although the police force has grown bigger in size and became more sophisticated and includes now more than 30 departments covering different aspects, its existence in Upper Egyptian villages is very limited. In each village, there is a police station comprising an average of 8-15 officers and police individuals from different ranks. Brigadier Reda said that police force is very weak in the village, and there is no force to protect the people, land and property what so ever. Therefore, there has to be a

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<sup>154</sup> Ibid, 91.

<sup>155</sup> Ibid, 91-102.



'*kabeer*' to protect people's interests. Weapons are very expensive, and therefore, owning them requires either being wealthy or planting drugs or armed robbery.<sup>156</sup>

The infiltration of the police into Upper Egyptian villages was not due to a political will to maintain peace and order but for political reasons. Egypt in the 1980s and 1990s faced the grave danger of militant Islamic groups, some of whom found refuge in such remote areas governed and protected by armed families. Only then did the state intervene in Upper Egypt to catch them. Due to the sophisticated geographical structure of mountains surrounding the cultivable valley, and the rigid tribal structure that has rules against turning in relative fugitives, police forces needed allies in the region to be able to reach even the most dangerous areas.

One of the most extreme examples of such alliances took place in *Nekheila* village in Assyut in 2004. The story has different versions, however, and as one police officer interviewed,<sup>157</sup> Ezzat Hanafy, the head figure of one of the two prominent families in *Nekheila* was a drug and arms dealer who was "created," as the officer said, by state officials. They helped his business, drugs, become lucrative in return for his efforts in turning in Islamist militant groups. However, in the year 2004, "problems" erupted between state officials and Hanafy who managed to isolate the village from any form of state control. As a result, the Ministry of Interior used heavy armaments and thousands of soldiers to "liberate" the village, and Hanafy received a death sentence in 2006. *Nekheila* is an extreme example of the regime making alliances with individuals; however, such alliances are manifested in relations with "al kabeer" (the major figure head in a village) or customary tribunals.

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<sup>156</sup> Kassem, p. 26-7.

<sup>157</sup> The police officer interviewed refused to disclose his name.

## **Conflict Resolution: Two Types**

Conflict resolution takes two forms, either through use of power by influential figures through their personal relations with police representatives or through customary tribunals, but the political implications for both forms are similar. During this research, two villages were visited, Nazza Karar and Al Mandara in the governorate of Assyut.

In Nazza Karar, Brigadier Reda belongs to the most powerful family in the village and the richest. He does not hold an official post in the village but his cosine, a major in the police force, is the official Omdah. The Omdah does not interfere in domestic problems as much as his cosine. Brigadier Reda talked with pride about the top police figures in the village he has good relations with from head of state security office in *Assyut*, head of security department in the governorate and all other major officers. “The head of security in the village –known as *Ma'mur*- calls me where there is a certain conflict to get to know the people, the history of the conflict, and how the issue should be handled. We work together.” he said.

Brigadier Reda gave plenty of examples of exchanging favors and cooperation to achieve peace and security in the village. Examples range from settling disputes between some fugitives living in the mountains surrounding the villages called '*matareed*' to personal problems. One of the very simple examples just settled before the interview is one where two families had a conflict. Animosity exacerbated even though there were inter-marital relationship between them. As a result, both families decided to expel two women and their children and forced their husbands into divorce. Both women asked Brigadier Reda to intervene. Brigadier Reda called the head of security in the village '*ma'mour*' to help him with the case. In return, the '*ma'mour*' asked both heads of families to deliver the machine guns they have or else

they would be detained under the emergency law. In the mean time, Brigadier Reda “ordered” them to have both husbands take their wives and children back. Both heads of families delivered some weapons, and were forced to order both husbands to re-marry their wives.

The question of ‘fugitives’ in the mountain is another complicated issue that is solved through personal relationships and alliances. Brigadier Reda said that they may not be all criminals or “bad people” as he labeled them. Some may be considered outcast for defying their families for whatever reason. Some families may consider it legitimate to kill one of their members if they follow orders. Others may be criminals in the legal sense of the term but innocent in such cultural setting such as some of those who took their vengeance. In this case, he has to live with other criminals who live off attacking villages, armed robbery or arms trade. Police cannot protect members from their families grip. Brigadier Reda said ‘*matareed*’ once shot some police officers, and the head of security in the governorate ‘*mudeer al amn*’ threatened other officers if they do not catch them. Police officers did catch them, but Brigadier Reda, knowing some of them, interfered to release them. He said that their release was achieved “for his sake,” which suggests that there might be other favors Brigadier Reda presents to the police. Brigadier Reda was very outspoken and vocal about such favors that help him keep the close relations with the police, support for the National Democratic Party (NDP). He said that he uses all his powers to help the party win the elections. He declares support to any NDP candidate and asks people to support him as well.

Customary tribunals are not ‘benign’ means of conflict resolution. They are different tools of political control, as the regime allies with some major families to solve dispute, through the Ministry of Interior. Customary tribunals work better in villages where there are

more than one and powerful family. In a multi-polar environment, there is no one single '*kabeer*' who has the charisma or influence over the people. Therefore, allying with a certain figure to help impose peace and order and guarantee voters' support is risky. Underneath the extensive use of customary tribunals lies plenty of political problems and issues that reveal institutional weakness in the Ministry of Interior.

First, adversaries seek reconciliation through arbitration rather than justice and peace. While various customary "judge" interviewed brag about their seeking justice and applying *Shari'a*, many cases show that they are very pragmatic in dealing with power politics in a conflict. For example, Rasha, an interviewee who lives in Assyut the city and whose brother is an immigrant had to give up portions of their inherited land located in the countryside to one of their neighbors who have the money, men and weapons to take over their entire land and used to attack the land every now and then. When they sought customary forms of conflict resolution, judges issued a decree giving some land to the "aggressive" neighbor to fend off his constant attacks on the original owners who do not have the means or the time to protect their land. The customary tribunal was not there, not to achieve justice, but rather to settle the issue pragmatically. Sheikh Odah said that one of the main principles of arbitration is derived from an Islamic principle of "درء المفسدة مقدم على جلب المنفعة" which means "warding off evil is more important than bringing benefits." The implication of this principle is that it is legitimate to compromise people's rights. Therefore, customary tribunals tend to reflect the existing power structure in the village. Power is defined in terms of wealth, weapons, and ability to bully other citizens if necessary.

Second, adversary parties have to agree to the holding of the tribunal itself. It is not mandatory, but held under ethical and social pressures. This means no recognition of the state as the primary arbitrator whose responsibility is upholding rule of law. Giving people the option for adjudicating or not adjudication is dangerous to its credibility and a sign of weakness. It means there are parties that are beyond pressures just because they are more powerful. In such an atmosphere, it is improper to talk about “justice.” Many customary judges, Sheikh Odah, and Refa’t Al Shelh, one of the customary judges of Manfalout, talked about the role played by the security institution in this regard. When a party refuses to resort to a customary tribunal, the police “uses its own means of forcing them into it,” all interviewees agree. This opens the door for use of brutality. Brigadier Mohamed Reda said that the police uses pre-signed emergency law decisions to do so. They hold them under emergency law until they are forced to accept to use the customary tribunal and accept its verdict. “Emergency law decisions are signed and ready in their offices ready to be used against anytime,” Brigadier Reda said. In this case, the nature and intensity of relations between each family and police is put into considerations, and some get special treatment. As spelt out in detail earlier, the literature on *tha’r* in the police academy discussed earlier when suggesting tools to solve conflicts, it focused on building relations with family figure-heads, the impartiality of the police in using emergency laws in detaining citizens is questioned. There are serious implications to such cooperation.

On the one hand, police force consolidates the existing power structures empowering the already influential families. Such relationships form the citizens’ view of the state, a brutal ally to the powerful families in the village and therefore a party in any conflict not an impartial entity. Therefore, the police is both a party to the conflict and an arbitrator. The ‘*kabarah*’ system explained earlier is also another form of consolidating the status quo and

existing distribution of power among families. It gives more leverage to the wealthy families and makes the poorer more vulnerable to wealthy.

Finally, a deeper look in the background of customary judges reveals that many of them are regime co-opted individuals who either join the NDP or support it. Ref<sup>7</sup> at Al Shelh of Manfalout is a famous customary judge in the area as well as the head of conflict resolution committee of the NDP branch in Assyut. Sheikh Odah of Shubra El Kheima was an NDP member and a member of parliament for years. Other customary judges met are also either NDP members or supporters. This raises question regarding the role of local governance in governing and settling disputes. A significant portion of customary judges control local councils that are well known for being a hub for local leaders looking for a stronger political role through the government and relations with the ruling party.

### **Role of Local Administration versus Role of Police in Conflict Resolution**

The police-state used local administration to help with the process of conflict resolution at the expense of its original role of local governance. This was the result of a long history of legal and actual conflict between the government wing advocating more independence from the central government and the security apparatus. From a normative perspective, the role of local leadership should include contributing to solving a wide array of problems people at the village level suffer from ranging from sanitation, schooling, water supply, access to fertilizers and pesticides, roads and all other village-related problems. In fact, these problems, conflict over land and access to water, are the main source of conflict that erupts in villages and consequently different kinds of attacks and *tha'r*. However, the regime has destroyed their real role in society. It altered their role, legally, from local “governance” to local “administration” and, de facto,

turning them into regime clients whose best contribution lies in resolving conflicts among families.

Although the dynamics are different from those used before 1952 coup, the Police force continues to play politics at the grass-root level by crushing the role of local government councils. Instead of having them play a role in local development, they are considered tools used by the police to control the political scene. It took the police a long time to strip local administration of their independence.

The relationship between police and local administration is hard to make generalizations about. However, there have been incidents where conflicts were reported, and the security institution finally managed to strip local authorities of many of their powers. One of the most important state administrative bodies in a village is an entity called “local council.” Local Councils are not local governments with a degree of autonomy. It is assumed to be “administrative structures executing government policies at the grassroots level.”<sup>158</sup> Egypt has 26 governorates each with two boards “governing” local affairs, an executive board with appointed government officials and popular local council directly elected by local communities.<sup>159</sup> In the 1980s, under Mubarak, the government changed its perception of the role of local administration “confining its role mainly to the provision of social services and the building of local infrastructure” limiting its representative function and emphasizing it developmental one.<sup>160</sup> The laws in the constitution governing the functioning of local councils in Egypt are designed to keep them under the mighty hand of the central government. First, their establishment is up to the

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<sup>158</sup> Ibrahim, Solava. *The Role of Local Councils: The American University in Cairo Press*, 10.

<sup>159</sup> Ibrahim, 11.

<sup>160</sup> *Ibid*, 16.

central government based on how it perceives “common interest.” Second, article 162 of the Constitution talks about “gradual transfer of authority” to local councils, a process that is entirely controlled by the central government. Third, article 163 of the Egyptian 1971 constitution leaves a large room for the government to direct all the activities of such councils. It is the government that determines their financial resources, their relations to the executive and legislative branches and the nature of their developmental role.<sup>161</sup> The law number 145 of 1988 changed the name of local authorities from “local government” and the name of the ministry managing local authorities, “Ministry of Local Government,” to “local administration” and “The Ministry of Local Administration” transforming it into a mere “administrative system” executing government policies at grass-root level as opposed to local government.

It is the High Council/Ministry of Local Administration that puts forward the rules as a part of the executive branch. There is the executive board in each governorate. This council is formed and headed by the governor including his assistants, chiefs of districts, towns, urban quarters and heads of public departments, agencies and authorities within the government. That council carries out, monitors and follows up the implementation of projects, prepares the budget, sets financial and administrative plans, examines recommendations of local councils and expresses their opinions on these proposed topic and investment projects, sets the regulations for effective performance.<sup>162</sup> They have monopoly over the decision making process at the local level, and the laws do not draw clear distinctions as to the rights and obligations of each body giving the executive councils the upper hand. Local elected councils are not allowed to challenge

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<sup>161</sup> Ibid, 17-8.

<sup>162</sup> Ibid, 23.



the decision of local councils. On the contrary, the law enables executive appointed officials to “check on local councils and interfere in their affairs”.<sup>163</sup>

There have often been conflicts between the security institution and men of local administration and even local officials like the governor himself, and the tension may be professional, personal or maybe both. Recent history has recorded incidents of this sort. Zaki Badr, the former Minister of Interior was the only one vocal about such problems. The problems may range from personal grievances of security officials thinking they more power than local officials and trespassing the governor’s authorities. The conflict happened between both parties when it comes to the way they deal with Islamic militant groups. For example, in Asyut in the 1980s, Al Nabawy Ismael, a former Minister of Interior, accused the governor of leaking information to the Islamic militant movements. They were known for their position refusing police confrontation with these groups.<sup>164</sup> The interesting piece of information is that all the governors of Asyut have are former police officials themselves.

In 1980-1981, a fierce battle took place regarding the first draft of the local administration law 1980/1. The draft gave the governor authority over the police force existing in the governorate. Al Nabawy Ismael, the minister of interior at the time, was absolutely against such law. It was against the “notion of security as a central service that cannot work with 26 mentalities, 26 policies in 26 governorates.”<sup>165</sup>

On the national level, the Minister of Interior is more powerful than the minister for Local Administration. However, at the village level, the relationship between both government

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<sup>163</sup> Ibid, 28.

<sup>164</sup> Cited in Al Gawadi, 122-4.

<sup>165</sup> Ibid, 124-7.

bodies has been fluctuating. Even though it is dangerous to draw generalizations, history sites cases of tension and sometimes cooperation between officials from both ministries on the governorate level as well as the village level.

There were cases where the head of a security establishment trespasses the governor in the governorate he is serving. The former minister of Interior, Zaki Badr cited the most celebrated examples of such occurring. He was the governor of Asyut before becoming the Minister of Interior, the head of the security establishment in Asyut used to trespass him in all decisions, and he even had his car searched for suspicion of illicit substance when he was out of Asyut.<sup>166</sup>

However, the most celebrated example happened in 1981, when the Ministry of Interior was planning to make a large campaign of arrests to members of *Al Jamm'aa Al Islameya* in Asyut, and the then, governor of Asyut Mohamed Othman Ismael, was accused of leaking that piece of information to the local population targeted with the arrests. At the time, the Minister of Interior, Al Nabawy Ismael, and Othman Ismail had their disagreements with regards to how to deal with the Jama'at. The governor, Othman Ismail, believed in the necessity of communication and cooperation rather than "direct conflict." The fact that the governor himself may come from a security background does not prevent such conflicts.<sup>167</sup>

The conflict escalated even more in the early eighties with the making of the law of local administration. The first draft of the law stipulated that the security bodies existing within the governorate should be put under the authority of the governor not the Minister of Interior. Fouad Mohy Din, the vice Prime Minister then, was the one insisting on incorporating such a law, but

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<sup>166</sup> Ibid, 122-3.

<sup>167</sup> Such incident was cited in Al Nabawy Ismael's diaries. Cited in Al Jawadi p. 123-5.

Al Nabawy Ismael, the Minister of Interior threatened to resign. He argued that Security in the country has to be central following one major strategy not 26 each for each governorate.<sup>168</sup> However, Sadat eventually refused to incorporate that clause in the new law. Hassan Abu Basha, a former Minister of Interior, used to complain from lack of political attention to the political views of security institution's members.<sup>169</sup> Eventually, the security institution won the battle, and local government was stripped of many of its powers and was restricted to simple developmental functions.

### **Conclusion**

History matters when explaining phenomenon such as the local systems of conflict resolution. Lack of state-controlled policing system in Upper Egypt that could protect land and property is the main reason behind all conflicts erupting. However, the irony is in the 21<sup>st</sup> century, still this problem exists. There is a police force existent in each and every village; however, the police cannot protect land and property. Still people rely on their own weapons and hired personnel to protect their economic interests and lives. In fact, the official formal institution of the state that is presumably responsible for upholding rule of law, the police force, is even consolidating the informal means of conflict resolution by all possible means.

Consolidating the system comes through creating a 'clientalist' network of political support at the local level. Most customary judges were linked to Mubarak's ruling party. All different channels of conflict resolution had to be through NDP members. In fact, Brigadier Reda summarized the relationship frankly when he talked about the need to protect his interest, and therefore, he has to ally with whoever is in power. In order to maintain the same power structure

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<sup>168</sup> Cited in Al Gawady p. 124-8.

<sup>169</sup> Al Gawadi p 142-3.

in the village, local leaders have to be co-opted by the regime, and in return, the regime helps with maintaining the status quo.

In the mean time, the role of local leader has to be constrained to be under the political control of the regime. The system of local governance was stripped of its power to be mere “administrators” whose only responsibility is to execute the centrally-put-forward policies. It is the body that should solve the root-causes of different community problems that is now has their members playing the role of “arbitrators.” Those same members belong to the same families who have the money and power to impose a certain power structure not uphold rule of law. The state agent responsible for upholding rule of law is in fact allying with those local power figures.

## CONCLUSION

Governability or social order is a multi-faceted phenomenon where different actors, state, society and ruling regime, interact on daily basis. Sometimes, it is the regime that is blamed for the weak intensity of governance. Sometimes, it is the cultural setting and social norms that are accused of being anti-state. Culture in Upper Egypt has always been blamed for the inability of the police force to penetrate society and uphold rule of law. Many excuses are given such as lack of community cooperation to resistance from the people. Layman explanation of the *tha'r* phenomenon may go as far as making accusations of Upper Egyptians for being “stubborn,” and “ignorance.” Such culturalist arguments are not worthy of analysis in a scholarly document. Instead, this piece of research has looked into the phenomenon, explained its cultural roots. It tackled the phenomenon of *tha'r* as part of a bigger phenomenon of informal means of conflict resolution and the weak state penetration in society. The essence of ‘stateness’ is its ability to enforce rule of law. Resorting to informality is a regime strategy to weaken the state. The regime compromised the role of the when it, first, it gave more power to customary forms of conflict resolution despite Egypt’s long legal and constitutional heritage. Second, it weakened the police force from the inside in ways that affected its ability perform its duty. Third, it made the security institution assume a political role in service of the ruling regime instead of achieving security.

The main obstacle to studying state capacity is the theoretical debates over the meaning of basic concepts of the “state” and “state capacity.” The different definitions and perspectives of the state have influenced the way scholarly literature has attempted to explain social phenomenon. This piece of research argues that state capacity is closely associated with the

ability to enforce rule of law through its executive arm. Rule of the law enforcement is the most important element of stateness across different fields, and it is the main determinant of state capacity.

The concept of the “state” has evolved throughout centuries from being a synonym for the ruling class, a reflection of the power struggles within society, an abstract idea of a “collective citizen” or a “General Will,” to a more sophisticated definition that refused the dichotomy between the state and society, refused reducing the state to a mere ruling class, acknowledge the abstractness of the idea of the state but pinpoints its manifestations in the real world. That is the Weberian definition of the state as the human community which monopolizes the legitimate use of force emphasizing the issue of governability or the intensity of governance versus anarchy.

The following analysis of governability in Egypt is based on the statist intuitionist approach that is based on the assumption that there the state is a different structure of power that is capable of affecting and altering the outcomes of regime policies and societal choices.

Customs are not necessarily associated with a traditional society. It is true that the formal state legal system evolved from being customary laws in Ancient times; however, customs still plays a significant role in the modern legal systems all over the world. Some legal systems are based, to a large extent, on customary norms, and others, such as Egypt, has custom as a major source of law. Custom and law are not in conflict, and in some cases, they are not in absolute harmony. The Egyptian legal system has four sources of law put forward in a hierarchy of power, laws promulgated by the parliament, custom, Islamic Jurisprudence and principles of justice and natural law. The conflict erupts when a long-established customary rule conflicts with the state

rules and laws such as the criminal code. Egypt is one of the countries with a strong legal and constitutional heritage. However, when people resort to informality, it might indicate problems with the legal system, either its judicial or executive branch.

The judicial system in Egypt does suffer problems that the political regime showed little interest in reforming, which might result into the very slow legal process and maybe compromising their independence and integrity. Judges are limited in number; their financial standard is not up to the current rates of inflation, and control for the executive branch of government. As a result, it can be argued that resorting to customary forms of conflict resolution is becoming a phenomenon. Contrary to common stereotypes, customary tribunals are not limited to Upper Egypt, which is already a large segment of population in Egypt, it is spreading in other parts of Egypt such as Sinai and the even the densely populated Delta Region. Such spread is a sign that the general trend is leaning towards customary forms of conflict resolution rather than state-mediated system.

Blaming *Tha'r* on poverty, illiteracy and tradition is a misleading conclusion. *Th'r* is indeed a cultural tradition, and most perpetrators are illiterates; however, this is far from being enough to prove that links *tha'r* to illiteracy. Educated family members still commit *tha'r*, but they may not take it with their own hands so as not “sacrifice” the educated members they take pride in. Professional assassins are hired for that purpose. In addition, limiting the scope of research to focusing on the social drives for *tha'r* means ignoring one of the most important actors involved in the phenomenon, the state. Ignoring the interaction of the main state institution that assumes the function of maintaining order in society, the police force, leads defiantly to deformed results.

The way the police force handles conflicts in Upper Egypt is influenced by the lens through which the police force views the social setting prevalent. The police force in Egypt perceives the '*tha'r*' as a purely sociological phenomenon that requires social and political remedies rather more than a security problems blaming all spread of *tha'r* to old decedent traditions and lack of religious awareness. Such a perception has pushed the police institution to adopt social and political tools to solve the problem deviating from their real function, law enforcement. To solve cases, instead of using the various criminal investigation tools, the police force is working in a totally different venue, customary tribunals and their main tool for imposing reconciliation on all conflicting parities is threat to use arbitrary dentition and torture.

However, while officers blame traditions, there are institutional problems within the Ministry of Interior that makes it hard for officers to perform their main duty. Officers do not have enough technical facilities to help with criminal investigation in order to surround suspects with evidence rather than torture them to confess. Officers suffer very harsh working conditions, lack of coaching and proper supervision. In the mean time, they suffer a deep sense of victimization for having to pay for the political failures of the regime in all walks of life. They have been blamed for all regime-threatening incidents, and therefore, the Ministry has shifted the focus from securing the community to securing the regime.

History matters when explaining phenomenon such as the local systems of conflict resolution. Lack of state-controlled policing system in Upper Egypt that could protect land and property is the main reason behind all conflicts erupting. However, the irony is in the 21<sup>st</sup> century, still this problem exists. There is a police force existent in each and every village; however, the police cannot protect land and property. Still people rely on their own weapons and



hired personnel to protect their economic interests and lives. In fact, the official formal institution of the state that is presumably responsible for upholding rule of law, the police force, is even consolidating the informal means of conflict resolution by all possible means.

Consolidating the system comes through creating a ‘clientalist’ network of political support at the local level. Most customary judges were linked to Mubarak’s ruling party. All different channels of conflict resolution had to be through NDP members. In fact, Brigadier Reda summarized the relationship frankly when he talked about the need to protect his interest, and therefore, he has to ally with whoever is in power. In order to maintain the same power structure in the village, local leaders have to be co-opted by the regime, and in return, the regime helps with maintaining the status quo.

In the mean time, the role of local leader has to be constrained to be under the political control of the regime. The system of local governance was stripped of its power to be mere “administrators” whose only responsibility is to execute the centrally-put-forward policies. It is the body that should solve the root-causes of different community problems that is now has their members playing the role of “arbitrators.” Those same members belong to the same families who have the money and power to impose a certain power structure not uphold rule of law. The state agent responsible for upholding rule of law is in fact allying with those local power figures.

### **Potential Cost for Applying Rule of Law & Recommendations for Future Improvement**

The co-optation of the Mubarak’s regime of local leadership and maintaining the existing power structure is a political choice, which raises a number of questions. The most important

question has to do with the cost of attempting to refrain from playing politics at the local level and achieving a shift in the police force towards efforts to abide by the law as much as possible. Enforcing rule of law would defiantly challenge the existing power structure at the village level challenging the authority of many power families. Major families in Upper Egypt are well known for being well armed and enjoy a varying degree of popular support in villages. Can the state interfere using its hard power to achieve a higher degree of law enforcement and equality before law without any consideration of the powerful leaders in the social community? The answer to this question is complicated.

As argued before, the emergence of the local system of conflict resolution with its rules, regardless of the how just these rules are nor not, was associated with lack of state interest in maintain peace and order in such areas. As mentioned earlier, the police started to exist only in the Eighties and Nineties of the twentieth century. For the people to stop relying on their own weapons and hired personnel to protect their land, property and their own lives, there has to be a trusted alternative. There has to exist a judicial process as well as an enforcement agency with a minimal degree of public trust.

The judiciary has to be revolutionalized. The numbers of courts and judges have to increase in order to examine as many cases as possible so that conflicting parties will not have to wait for years in court. Second, judges have to enjoy a larger degree of independence from the executive branch to guarantee independence. Third, the financial standard of judges has to increase in order to minimize cases of judicial corruption.

On the other hand, the executive arm has to undergo severe internal changes. Resources have to be properly channeled to serving the community, adopting modern techniques of

criminal investigation, providing officers with proper coaching and supervision, and the police force need to change their perspective of the residents of the local traditions. Traditions and norms are not static ideas that people are destined to follow. Norms change, and underneath these norms, there are power relations and pragmatic reasons that helped them exist.

### **Does the State have a Choice?**

By nature, the state is one of the very powerful tools capable of inflicting change if the political regime controlling it is willing to. Of course it cannot eliminate such a deeply entrenched phenomenon especially after decades of official recognition and encouragement; however, state intervention in the right direction may provide an alternative to the people. Historically, people resorted to customary forms of conflict resolution mainly because of pragmatic reasons. If the conditions change, an increasing number of people will move towards more just paths of conflict resolution rather than having to comply with political power compromises that could be unjust many times. Change does not take place overnight. However, the political regime entrusted to the managing the state has to start with reform and follow the proper track of upholding rule of law as much possible.

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